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THE LAW
OF
LAND CONTRACTS

BY
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OF THE DETROIT BAR

CHICAGO
CALLAGHAN & COMPANY

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Preface

This work is submitted to the legal profession as the result of several years' research on the various subjects treated. It is intended to be a practical treatise for the busy practitioner on the subject of land contracts, preliminary and otherwise, and of the rights, remedies, and obligations growing out of such contracts.

The equity forms incorporated in this treatise have been made as brief as possible to conform to the letter and spirit of the Judicature Act. Certain changes have been made to conform to recent Supreme Court decisions, statutory provisions, and Circuit Court Rules. These modern changes are discussed in Section 80 of the text.

The author desires to acknowledge receipt of many helpful suggestions from members of the Detroit bar in the preparation of the manuscript, for which he extends thanks and will be pleased to receive in the future suggestions as to how the work may be improved.

He is also mindful of the fact that this treatise will not answer every question presented to it by the legal profession on the subjects discussed herein, nevertheless, if this work shall render the law of Land Contracts and collateral subjects more accessible to the legal profession, the author will feel himself well repaid for the labor expended thereon.

ASHER L. CORNELIUS.

Detroit, Michigan, March 1, 1922.

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Table of Contents

CHAPTER I

IMPORTANCE OF PRELIMINARY AGREEMENT—PRACTICAL SUGGESTIONS IN REGARD THERETO—DUTY OF COUNSEL IN REGARD TO CLOSING TRANSACTIONS

- § 1. Introductory Statement.
- § 2. Closing of Transaction—Importance of Preliminary Agreement.
- § 3. Details Which Should Be Settled By the Preliminary Agreement.
- § 4. Duty of Counsel in Closing Transaction Where Preliminary Agreement Is Silent on Important Details.
- § 5. Counsel Should Avoid Acting in Dual Capacity.
- § 6. Broker Not to Draw Agreement.
- § 7. To What the Vendor Is Entitled.
 [or]
- § 8. To What the Vendee Is Entitled.
- § 9. Substitute for Non-Assignment Clause.

CHAPTER II

STATUTE OF FRAUDS—SUFFICIENCY OF THE PRELIMINARY AGREEMENT—ORAL CONTRACTS PARTLY PERFORMED—MISCELLANEOUS

- § 10. The Statute of Frauds—General Considerations.
- § 11. Auction Sales—Sufficiency of Memorandum.
- § 12. Statute of Frauds—What Contracts Affected By.
- § 13. Agreements Pertaining to Real Estate Held Not Within Statute of Frauds.
- § 14. Statute of Frauds Surrender or Release of Interests.
- § 15. The Memorandum May Consist of Letters, Telegrams and Detached Writings.
- § 16. Aiding Memorandum by Parol Evidence.

- § 17. Provisions of the Preliminary Contract.
- § 18. Essential Elements of Preliminary Contracts for Sale of Real Estate.
- § 19. Effect of Void Agreements Under Statute of Frauds.
- § 20. Effect of Part Performance of Oral Agreement to Sell Real Estate—General Considerations.
- § 21. Actions at Law On Verbal Contracts Partly Removed.
- § 22. When Disposal of Land Contract in Escrow Advisable.
- § 23. Loss by Fire Pending Purchase.
- § 24. Sufficiency of Tender of Performance.
- § 25. Pleadings and Briefs in Late Michigan Cases.

CHAPTER III

FORMS OF PRELIMINARY CONTRACTS—LAND CONTRACTS ASSIGNMENT OF LAND CONTRACTS—ESCROW AGREEMENTS—POWERS OF ATTORNEY

- § 26. Short Form Preliminary Contract for the Sale of Real Estate for Cash.
- § 27. Preliminary Agreement, Short Form.
- § 28. Preliminary Contract for the Sale of Real Estate—Form Favorable to Vendee.
- § 29. Form Favorable to the Vendor.
- § 30. Escrow Memorandum for the Disposition of a Land Contract in Escrow.
- § 31. Defective Forms of Land Contract.
- § 32. Form of Land Contract—General.
- § 33. Wayne County Abstract Company's Form.
- § 34. Forms of Land Contract—Union Trust Company Form.
- § 35. Detroit Land Contract Form.
- § 36. Form of Land Contract With Special Tax Clause.
- § 37. Contract for Sale of Farm Land on Long Time.
- § 38. Form for Recording Payments on Land Contracts.
- § 39. Assignment of Land Contract, Long Form.
- § 40. Assignment of Land Contract, Short Form, with Consent of Vendor.

- § 41. Contract for the Sale of City Lots, Vendor to Advance Funds for Building.
- § 42. Power of Attorney to Lease or Sell Land.

CHAPTER IV

LAND CONTRACTS — NATURE OF ESTATE CREATED — EXECUTION, PARTIES, CONSTRUCTION — MISCELLANEOUS TOPICS

- § 43. Nature of Estate Created by Land Contract.
- § 44. Nature of Estate Where Vendees Are Husband and Wife.
- § 45. Respective Shares When Vendees Are Husband and Wife Joined With Others.
- § 46. Land Contracts, Capacity of Parties.
- § 47. Land Contracts, Execution, Statutory Requirements.
- § 48. Consideration Need Not Be Stated in Contract.
- § 49. Land Contracts, Acknowledgments and Registration.
- § 50. Form of Acknowledgment, Statutory Provision.
- § 51. Authentication of Written Instruments Executed Outside of the State.
- § 52. Acknowledgments in Other States and Territories.
- § 53. Acknowledgment of Contracts Executed in Foreign Countries.
- § 54. Land Contracts Defectively Executed, Curative Statutes.
- § 55. Land Contracts as Evidence (Certified Copy).
- § 56. Discharging Land Contracts of Record.
- § 57. Registration of Land Contracts Where Land Affected Lies in Two or More Counties.
- § 58. Possession by Vendee as Constructive Notice of Contract.
- § 59. The Specific Tax on Land Contracts.
- § 60. Basis of Computing Specific Tax on Land Contracts.
- § 61. Sale of Expectant Interests.
- § 62. Vendor's Equitable Lien for Unpaid Purchase Price.

CHAPTER V

CORRECTING DEFECTS IN TITLE—MARKETABLE TITLE—
TITLE BY ADVERSE POSSESSION—ADVERSE POSSES-
SION OF VACANT, WILD AND UNOCCUPIED LAND
—REMEDYING DEFECTS IN THE TITLE BY
AFFIDAVIT—DISCHARGING ANCIENT
MORTGAGES—PLEADING, PRAC-
TICE AND FORMS

- § 63. Marketable Titles—Terminology.
- § 64. Clouds on the Title—Definition.
- § 65. Discharge of Mortgage of Record by Petition.
- § 66. Defects of Record, Remediable Affidavits—Forms.
- § 67. Form of Petition for Discharge of Mortgage.
- § 68. Form of Certificate Discharging Mortgage.
- § 69. Defects in Title Curable by Affidavits.
- § 70. Title by Adverse Possession.
- § 71. Adverse Possession When Five-Year Period Suf-
ficient to Vest Title.
- § 72. Adverse Possession by One Co-Tenant Against
Another.
- § 73. Adverse Possession Vendee Against Vendor.
- § 74. Adverse Possession of Vacant, Wild and Unoccupied
Land.
- § 75. Adverse Possession Against the State.
- § 76. Taking Successive Possession.
- § 77. Titles Held to Be Defective—Michigan Decisions.
- § 78. Defective Titles—Decisions from Other States.

CHAPTER VI

REMEDYING DEFECTS IN THE TITLE—THE ACTION TO
QUIET TITLE

- § 79. Quieting the Title.
- § 80. Equity Pleading and Practice—Modern Changes.
- § 81. Bill of Complaint—Statutory Provisions.
- § 82. Quieting the Title—Outstanding Tax Titles.
- § 83. Statutory Provisions—Parties Unknown Defend-
ants.
- § 84. Substituted Service—Unknown Defendants, Ap-
pointing Guardian Ad Litem.

- § 85. Parties Not to Be Joined as Unknown Defendants Unless Fifteen Years Have Elapsed.
- § 86. The Action to Quiet Title—Miscellaneous Michigan Decisions.
- § 87. Bill of Complaint to Quiet Title Because of Outstanding Tax Titles, Misdescription of the Premises, Failure to State the Marital Status of Certain Grantors, Containing Averments Necessary in the Case of Unknown Heirs, Legatees and Devisees.
- § 88. Decree Quieting Title Because of Outstanding Tax Titles, Misdescription of the Premises, Failure to State the Marital Status of Certain Grantors.
- § 89. Decree to Quiet Title—Cancel Land Contract.
- § 90. Effect of Decree.
- § 91. Bill of Complaint to Cancel Land Contract After Forfeiture.
- § 92. Bill of Complaint Form to Quiet Title—Cloud Created by Quit-Claim Deed by Vendee.
- § 93. Bill of Complaint to Quiet Title to an Easement.
- § 94. The Pleadings and Briefs Used in Late Michigan Cases.

CHAPTER VII

SPECIFIC PERFORMANCE OF LAND CONTRACT—RELIEF, WHEN GRANTED—WHEN DENIED— GENERAL PRINCIPLES

- § 95. The Remedy Discretionary.
- § 96. Specific Performance, General Principles.
- § 97. Application of the Remedy
- § 98. Same Subject—Continued.
- § 99. Specific Performance of an Agreement to Execute a Land Contract.
- § 100. Pre-Dated Agreements Executed on Sunday.
- § 101. Intoxication as Grounds for Refusal, Specific Performance of Contracts.
- § 102. Relief Where Wife Fails.
- § 103. Relief Refused Even if Facts Would Not Warrant Rescission.

- § 104. Specific Performance by Vendor Against Vendee.
- § 105. Inadequacy of Consideration Grounds for Denial or Relief.
- § 106. No Relief if Contract Is Unfair, Harsh, Oppressive or Inequitable.
- § 107. Where Non-Enforceable Agreement Performed By Plaintiff.
- § 108. Specific Performance of Option Contracts.
- § 109. No Relief When Performance Would Be Nugatory or Decree Impossible to Enforce.
- § 110. What Mistakes Warrant Denial of Specific Performance.
- § 111. Effects of First Substantial Breach.
- § 112. Mutuality of the Remedy—Exceptions.
- § 113. Relief Granted—Illustrated Cases.
- § 114. Illustrative Cases—Relief Denied.

CHAPTER VIII

SPECIFIC PERFORMANCE—PARTIES TO THE ACTION— FORMS—BILLS OF COMPLAINT—DECREES—PRO- CEEDINGS IN THE PROBATE COURT—FORMS

- § 115. Parties to the Action.
- § 116. Specific Performance Substituted Service.
- § 117. Grantee of Vendor as Defendant.
- § 118. Specific Performance Vendor Against Assignee of Vendee.
- § 119. Specific Performance Against Assignee in Bankruptcy.
- § 120. Evidence, Practice, Miscellaneous Decisions.
- § 121. Specific Performance—Illustrative Cases—Relief Granted.
- § 122. Specific Performance—Illustrative Cases—Relief Denied.
- § 123. Specific Performance—Bill of Complaint—Agreement in Writing.
- § 124. Decree for Specific Performance of Written Contract.
- § 125. Specific Performance—Bill of Complaint, Verbal Agreement.

- § 126. Specific Performance—Bill of Complaint by Vendee
Against Administrator and Heirs of Vendor.
- § 127. Bill of Complaint—Vendor Against Vendee.
- § 128. Status of Unfulfilled Land Contracts in Case of
Death of One of the Contracting Parties.
- § 129. Specific Performance in the Probate Court.
- § 130. The Petition.
- § 131. The Hearing.
- § 132. Provisions for Appeal.
- § 133. Effect of Conveyance.
- § 134. Effect of Registration of Decree.
- § 135. Specific Performance by Guardians of Incompetents
and Spendthrifts.
- § 136. Specific Performance by Guardian of Minors.
- § 137. Form of Petition for Specific Performance.
- § 138. Form of Order for Publication.
- § 139. Form of Proof of Service.
- § 140. Form of Proof of Publication.
- § 141. Form of Order for Specific Performance of Land
Contract.
- § 142. Deed Where Executor or Administrator Conveys
Pursuant to Land Contract Under P. A. 396, 1919.
- § 143. Pleadings and Briefs Used in Late Michigan Cases.

CHAPTER IX

FORFEITURE OF LAND CONTRACTS—POSSESSORY PROCEEDINGS, BY VENDOR

- § 144. Remedies Available to the Vendor Upon Breach of
Contract by Vendee—General Consideration.
- § 145. Michigan Doctrine of Forfeiture, Generally.
- § 146. Forfeiture of Land Contract in Case of Death of
One of Contracting Parties.
- § 147. First Step in Effecting Forfeiture of Contract.
- § 148. Where the Contract Waives Notice of Forfeiture.
- § 149. Notice of Forfeiture—Forms.
- § 150. Waiver of Forfeiture or Default in the Contract.
- § 151. Courses Open to Vendor After Forfeiture.
- § 152. Action in Ejectment by Vendor.
- § 153. Vendor's Action in Ejectment—The Declaration.

- § 154. Ejectment, Declaration Form.
- § 155. Vendee Estopped to Deny Vendor's Title.
- § 156. Actions in Ejectment by Vendor or Vendee Against Third Persons.
- § 157. Summary Proceedings by Vendor for Possession.
- § 158. Form of Complaint in Summary Proceedings.
- § 159. The Plea in Summary Proceedings.
- § 160. Incidents in Relation to Summary Proceedings.
- § 161. Service Where Defendant Cannot be Found.
- § 162. Steps on Appeal from Circuit Court Commissioner.
- § 163. Form of Affidavit on Appeal.
- § 164. Bond on Appeal.
- § 165. Return on Appeal.
- § 166. Effect of Final Judgment in Possessory Proceedings.
- § 167. Effect of Registration of Writ of Restitution.
- § 168. Proceedings to Have Forfeiture Decreed.
- § 169. Bill of Complaint—Form to Have Forfeiture Legally Established.
- § 170. Decree, Form of Declaring Forfeiture Effected.

CHAPTER X

FORFEITURE WHEN SUSTAINED, WHEN RELIEF FROM GRANTED—ILLUSTRATIVE CASES—PLEADING, PRACTICE AND FORMS

- § 171. Relief from Forfeiture When Granted, General Principles.
- § 172. Forfeiture of Contract for Violation of Non-Assignment Clause.
- § 173. Same Subject Continued.
- § 174. Forfeiture Not Sustained. Illustrative Cases.
- § 175. Relief from Forfeiture Granted, Illustrative Cases.
- § 176. Examples of Relief from Forfeiture Granted.
- § 177. Relief from Forfeiture Granted. Illustrative Cases.
- § 178. Relief from Forfeiture Granted. Illustrative Cases.
- § 179. Forfeiture Sustained. Illustrative Cases.
- § 180. Forfeiture Sustained. Illustrative Cases.
- § 181. Forfeiture Sustained. Illustrative Cases.
- § 182. Forfeiture Sustained. Illustrative Cases.
- § 183. Relief from Forfeiture Necessity of Tender.

- § 184. Relief from Forfeiture After Final Judgment by Circuit Court Commissioner.
- § 185. Relief from Forfeiture, Bill of Complaint, Form of, Including Averments for Specific Performance and Injunctive Relief.
- § 185A. Pleadings and Briefs in Late Michigan Cases Involving Relief from Forfeiture.

CHAPTER XI

FORECLOSURE OF VENDOR'S LIEN—PLEADING AND PRACTICE

- § 186. Foreclosure by Vendor, Nature of Action.
- § 187. What Actions Are Waived by Pursuing Remedy of Foreclosure.
- § 188. Pursuing Foreclosure and Action at Law for Purchase Price Concurrently.
- § 189. Foreclosure of Land Contract—Bill of Complaint Form.
- § 190. Decree of Foreclosure—Form.
- § 191. Commissioner's Deed on Foreclosure Sale.
- § 192. Notice of Sale by Circuit Court Commissioner—Form.
- § 193. Affidavit of Posting Notices of Sale—Form.
- § 194. Circuit Court Commissioner's Report of Sale—Form.
- § 195. Exhibit "C," Statement of Fees and Disbursements by Circuit Court Commissioner on Sale.
- § 196. Forms of Receipts from Circuit Court Commissioner.
- § 196A. Pleadings and Briefs Used in Late Michigan Cases in the Foreclosure of Vendor's Liens.

CHAPTER XII

REFORMATION OF LAND CONTRACTS—PLEADING AND PRACTICE—LATE MICHIGAN CASES

- § 197. Reformation of Land Contracts.
- § 198. Illustrative Michigan Decisions.
- § 199. Mistakes of Law.
- § 200. Evidence.
- § 201. Bill of Complaint to Reform a Land Contract—Form.

- § 202. Decree Reforming Land Contract—Form.
- § 203. Pleadings and Briefs of Counsel Used in Late Michigan Cases Involving the Reformation of Instruments.

CHAPTER XIII

ACTIONS FOR FRAUDULENT MISREPRESENTATIONS— PLEADINGS, EVIDENCE, MISCELLANEOUS —BILLS OF COMPLAINT—PLEAD- INGS AND BRIEFS USED IN LATE MICHIGAN CASES

I. FALSE REPRESENTATIONS

- § 204. General Principles.
- § 205. Materiality of Representations.
- § 206. Representations as to Matter of Law.
- § 207. Expressions of Opinion.
- § 208. Promises as to improvements or Use of Real Property.
- § 209. Representations as to Title, Interest.
- § 210. Concealment of Encumbrance.
- § 211. Representations as to Quantity, Boundaries or Location.
- § 212. Representations as to Value.
- § 213. Representations as to Quality, Conditions and Improvement.

II. REMEDIES FOR FRAUDULENT MISREPRESENTATIONS

(A) Of the Purchaser.

- § 214. Jurisdiction of Equity.
- § 215. Actions at Law.
- § 216. Time to Rescind.
- § 217. Waiver of Right to Rescind by Acts or Assertions of Ownership.
- § 218. Restoration of Status Quo.
- § 219. Damages.

(B) Of the Vendor.

- § 220. In General.
- § 221. As to Area.
- § 222. As to Title.
- § 223. As to Value of Land.

- § 224. As to Thing of Value Given for Land.
- § 225. Non-Disclosure and Concealment.
- III. PLEADING AND PRACTICE
- (A) Equity.
- § 226. Requisite of Bill of Complaint.
- § 227. Allegations of Fraud and False Representations.
- § 228. Describing Instrument.
- § 229. Showing Promptness and Diligence.
- § 230. Offer to Restore or do Equity.
- § 231. Answer or Counterclaim.
- § 232. Form of Bill of Complaint.
- (B) Actions at Law.
- § 233. Requisites of Declaration.
- § 234. Form.
- § 235. Declaration.
- § 236. Pleadings and Briefs Used in Late Michigan Cases,
Involving Actions for Fraudulent Misrepresenta-
tions, Both in Equity and in Law.

CHAPTER XIV

REAL ESTATE BROKERS—STATUTORY PROVISIONS— LICENSING RIGHTS—DUTIES, LIABILITIES, MISCELLANEOUS

REAL ESTATE BROKERS

- § 237. Definition.
- § 238. Regulation and Licensing.
- § 239. Form of Application for License for Real Estate
Broker.
- § 240. Form of Application for License for Real Estate
Broker.
- § 241. Form of Application for License for Real Estate
Salesman.
- § 242. Commission Agreement.
- § 243. The Decisions on the Duty of the Broker.
- § 244. When Commission Earned.

CHAPTER XV

OPTIONS

- § 245. Definition and Nature, Real Estate Options.
- § 246. Formal Requisites.

- § 247. Form of Options.
- § 248. Consideration.
- § 249. Statute of Frauds.
- § 250. Option Contract Distinguished from Contract of Sale.
- § 251. Option Contract Distinguished From Agency.
- § 252. Assignability of Option Contract.
- § 253. Time of Exercising Option Contract.
- § 254. Discharge of Option Contract.
- § 255. Payment and Tender.
- § 256. Effect of Exercising Option or Election.
- § 257. Against Whom Enforceable.
- § 258. Remedies.
- § 259. Specific Performance.
- § 260. The Option Upheld.
- § 261. The Option Defeated.
- § 262. Controversy as to the Character of the Instrument.

CHAPTER I

IMPORTANCE OF PRELIMINARY AGREEMENT PRACTICAL SUGGESTIONS IN REGARD THERETO DUTY OF COUNSEL IN REGARD TO CLOSING TRANSACTION

- § 1. Introductory Statement.
- § 2. Closing of Transaction. Importance of Preliminary Agreement.
- § 3. Details Which Should be Settled by the Preliminary Agreement.
- § 4. Duty of Counsel in Closing Transaction Where Preliminary Agreement is Silent on Important Details.
- § 5. Counsel Should Avoid Acting in Dual Capacity.
- § 6. Broker Not to Draw Agreement.
- § 7. To What the Vendor is Entitled.
- § 8. To What the Vendee is Entitled.
- § 9. Substitute for Non-assignment Clause.

§ 1. Introductory Statement.—Usually the first step towards consummating a sale of real estate is the execution of some sort of preliminary memorandum of agreement to bind the bargain accompanied by some payment on the purchase price by the vendee. A logical arrangement of a treatise on the subject of land contracts requires treatment of such preliminary agreements in the beginning of the work.

§ 2. Closing of Transaction — Importance of Preliminary Agreement.—In every transaction involving the sale and purchase of real estate there are usually two important stages: The preliminary and the closing one.

There are a number of reasons why a transaction is not and should not be closed immediately upon the vendor and vendee coming together. The weightiest of these reasons is, that the vendee knows nothing about the character of the title which he is to acquire. It is quite true that in most cases the land contract furnished the vendee contains the vendor's guarantee to furnish a good title, but misunderstandings as to what constitutes such a title are so common, and the value of the vendor's guarantee is so frequently unknown, that no one

should attempt to purchase property on land contract relying solely upon the representations of the vendor that at the proper time he will show a marketable title.

Perhaps the controlling consideration in such a transaction, that upon which depend all future relations between the vendor, the vendee and the broker as well, is the preliminary agreement. Much care and attention should be devoted to the preparation of this instrument. For it is this which determines whether or not the contract between the parties will be disposed of under the harmonious conditions which ought to surround the closing of every transaction for the sale of real estate. An erroneous notion persists among many of those who prepare instruments involving the sale of land, that whatever matter is omitted or not made clear in the preliminary agreement can be remedied and clarified at the time of closing. The preliminary agreement fixes the status of all the final relations between the parties. Neither the vendor nor the vendee need accept a land contract which either enlarges or limits the rights or obligations of either party and is not in full compliance with the preliminary agreement. If, as frequently occurs, either of the parties is willing to have his obligations enlarged in the final agreement, difficulty can be and often is avoided; if not the entire purpose of the preliminary agreement is nullified. The parties find it impossible to agree on the omitted details and needless and expensive litigation is bound to be the result.

As already indicated, the entire function of the preliminary agreement is to show the basis upon which the vendor and vendee have come together; who they are; what particular property is being sold; the price and consideration therefor; the terms and time of payment.

When these essentials are provided for, other details remain to be dealt with in the preliminary agreement, such as adjustment of rentals, date of possession of the property to be given, payment of assessments and other taxes, fire insurance, and many other details certain to arise when the transaction shall be finally closed.

The whole reason for the necessity of providing for all those matters in the preliminary agreement apart from the legal re-

quirement, is to create a situation that is thoroughly understood by all concerned. It is to make them give and take when they are both freshly interested in the transaction and neither bound. It is to make them yield on various points which require yielding by one side or the other, when refusal to do so might overthrow the deal. It is intended, in short, to preclude every possible cause for friction or misunderstanding at a later date.

§ 3. Details Which Should Be Settled by the Preliminary Agreement.—The vendor and vendee often find cause for differences at the time of closing, on the following apparently simple matters; all of which, where the facts warrant, should be dealt with by the preliminary agreement.

(a) As to the nature of the title or interest which the vendor sells—whether he is the owner in fee of the property or derives his interest therein through a first, second, or third land contract (sub-contracts so called)—if such an interest in property is not, in the opinion of the vendee or his attorney, safe to acquire, the time to determine it is when the agreement for its purchase is drafted and not at the closing.

(b) If the vendee is satisfied with an interest of that character, in what manner shall he be protected in case of default in the land contract under which the vendor is acquiring his interest. Provision for this should be made in the preliminary agreement and should be incorporated in the final land contract.

(c) Who shall pay the taxes which accrue and become payable between the time of executing the preliminary agreement and the time of closing the sale.

(d) Who shall pay those installments of assessments which are payable subsequent to the execution of the final contract between the parties, but which are due in advance.

(e) Who shall pay unpaid assessments, such as paving, sidewalk, street opening and sewer.

(f) Shall the vendor or vendee pay for the water charges which are due and unpaid at the time of closing or shall it be apportioned between them.

(g) If the same attorney represents and acts for both parties, who shall pay the cost of his services.

(h) Who shall pay the cost of examining the abstract of title.

(i) Who shall pay the cost of certifying the abstract of title, and what company shall certify the same.

(j) Who shall pay the mortgage tax on the land contract and is it to be paid before, at the time of, or after default.

(k) Who shall pay the cost of recording necessary instruments and incidental disbursements therefor.

(l) Shall the vendee refund to the vendor at the time of closing the unused portion of the insurance premium advanced by the vendor.

(m) If it is not intended that the vendor deliver possession of all or part of the property at the time of closing, shall the vendee pay interest on the full balance due from the vendee for the time the vendee is not enjoying the full use of all or part of this property, from what date shall payment of interest be computed.

(n) When shall possession of all or part of premises be delivered to the vendee by the vendor or his tenants or lessees.

(o) Shall the vendor or his tenants or lessees pay any rent for the period of his or their occupancy for all or part of the premises; if so, how much.

(p) What form land contract shall be furnished by the vendor, and what provisions shall such land contract contain other than those already printed therein, or what shall be eliminated therefrom.

(q) Shall the vendor furnish the vendee with a copy of his own land contract (in case he is selling on a second land contract or sub-land contract), so that the vendee may be certain that he will secure, when he has fully paid, the equity or interest of his vendor.

(r) What kind of leases or other agreements exist and what are the rights and obligations which the vendee is expected to assume thereunder.

(s) A date should be specified prior to which the vendor shall deliver the vendee's abstract of title to the vendee for examination. A date should be also named prior to which the vendee should examine the title and signify either his acceptance or rejection thereof. It should also be specified that

in the event title should be found to be clouded or encumbered which defects can be remedied by an action to quiet title or otherwise, the length of time the vendor will be given to remedy such defects.

Most of the subjects above referred to are controlled to some extent by the law, but our purpose here is to suggest the necessity for setting forth as clearly as possible the respective rights and obligations of the parties at the time of drawing the preliminary agreement. Very often when provision for some necessary detail is not made in the preliminary agreement, the layman will follow his own misconception as to what he deems the law to be; especially is this true when the true conception of the law will injure him financially.

§ 4. Conduct of Counsel in Closing Transaction Where the Preliminary Agreement Is Silent on Important Details.—It is surprising how often transactions involving many thousands of dollars are made between parties in a loose, offhand manner and without advice of counsel, and with nothing to indicate the agreement except some carelessly drafted receipt or obscure memorandum, in the expectation that when the time of closing arrives, counsel will look after and straighten out and complete everything. Under such circumstances, it would be manifestly unfair for the attorney who is called in to close the transaction to attempt to capitalize the omissions of the parties where they were made in good faith. He should not, while representing his own client, act arbitrarily towards the rights of the other side. He must take what material he has and construct an agreement between the parties in keeping with their honest and unwritten intentions. It need hardly be said that he is not to attempt to gain any undue advantage nor should any client expect him to do so.

When the parties drew their agreement they were both acting in good faith; they assumed that they had incorporated all that was necessary for the time being. Doubtless all the essential requirements of the law were complied with and in the agreement there are present the necessary elements of a valid contract. And yet opportunities for misunderstanding remain.

In such a situation the attorney can demonstrate not only his legal but his business capacity as well, for every difficult

situation can be controlled by a just and proper conception of the respective rights and obligations of the parties. The lawyer at such times can ask much and give little but it is not his function to take petty advantage, to overreach or be arbitrary. Only a spirit of fairness and consideration will assist counsel in accomplishing the result expected.

§ 5. Counsel Should Avoid Acting in Dual Capacity.—Frequently when either the vendor or vendee has the services of an attorney who regularly transacts all or most of his business, he brings the other party to such attorney for the purpose of consummating the deal. A serious question of policy arises at such time. What position is counsel to take under the circumstances? Shall he act in a dual capacity and of course try and be just and equitable to both sides? Shall he favor his own client to the detriment of the other? Or shall he only act for one of the parties?

The nature of the transaction should invariably decide the question for him. If it is a complex transaction, if a number of issues are likely to come up in which the interests of the parties are or threaten to become antagonistic and conflicting, the answer is very simple. He should act only for one side. If, on the other hand, no complicated situations are likely to arise, there can be no reasonable objection to dual representation. Exercise of fairness and sound discretion under such circumstances will create good will for the attorney with both sides.

§ 6. Broker Not to Draw Agreement.—Unlike some of the States, Michigan has no law on her Statute books prohibiting laymen from preparing legal instruments. So many individuals have become engaged in the industry of buying and selling real estate on land contracts, or representing others in such transactions that the advisability of excluding everybody except the profession from drawing such instruments is a debatable question. But much litigation could be avoided if no one but an experienced conveyancer would prepare such instruments.

The matters involved in the preparation of a preliminary agreement, the passing upon the marketability of the title, and the execution of the final land contract, are very often more

complex than is apparent to the layman. In nearly every transaction there is some phase that is a little new and a little different from the last one. The broker who attempts to examine a title, or pass one without an examination, or encourage the purchase without seeing an abstract, not only fails in his duty as a broker, but assumes an unnecessary burden and responsibility. Nor should he be required or expected to examine titles and prepare instruments for the purpose of earning his brokerage charge.

Though haste in closing a transaction is inadvisable, yet undue procrastination on the part of the attorney in rendering the necessary services in the case, has a tendency to destroy the interest of the parties. So also does overreaching and unnecessary fault finding. Absolute co-operation between the broker and attorney is to be sought, and the lawful interests of the broker should always be safeguarded by the attorney.

§ 7. What the Vendor Is Entitled To.—We can point out only some of the essential matters which the vendor has a right to have incorporated in the preliminary and final land contract. Matters of greater or less importance will arise that require special consideration, but these vary in nearly every transaction.

The following suggest themselves:

(a) That interest on all unpaid sums shall be computed from and after the date of the execution of the land contract, provided possession is delivered at such time.

(b) That insurance premiums advanced by the vendor for the period starting after possession is delivered to vendee shall be refunded to the vendor. It is customary to insure property for one, two or three years and to pay the premium for the entire period in advance. If, for instance, the vendor has only used six months of such premium, the vendee should refund the amount representing the unused portion of such premium.

(c) That the property shall be used by the vendee in accordance with the restrictions which may exist against the same, and that it be kept in good repair by him.

(d) That the vendee shall assume any encumbrances which may exist against the property, whether the same be placed thereon by the vendor or his predecessors, and that the vendee

shall join in the execution of any new mortgage which may replace the old mortgage after its maturity and discharge, the amount, however, not to exceed a stated sum, and never to exceed the interest of the vendor remaining in said property at the time of execution of such new mortgage; that such mortgage shall be deemed a lien or claim superior and prior to the interest of the vendee in the said property.

(e) That all taxes and assessments which shall be levied against the property after its sale to vendee shall be paid for promptly and punctually by the vendee; and that said vendee keep the said property insured in a sufficient amount and with an insurance company to be approved by the vendor.

(f) That no assignment shall be made by the vendee without written notice thereof to the vendor.

§ 8. Substitute for Non-Assignment Clause.—For several years some of our intermediary courts have proceeded upon the theory that no forfeiture of a land contract can be declared upon a violation of the provision that the vendee shall not assign or transfer any or all of his interest without the written consent of the vendor. The opinion has been held that this clause is not binding upon the vendee and that the vendor cannot prevent the alienation of the equitable interest of the vendee by a provision of that character.

The question has not been squarely before the Supreme Court. But whatever position this Court may take with respect to the validity of said clause, there can be no doubt that frequently the vendor sells his property with a very small down payment to a vendee whom he deems financially and morally responsible, thereby relying not only on the property as security for the balance, but to a greater extent, on the moral and financial responsibility of such vendee. Sometimes also, the friendly relations which may exist between the vendor and vendee may be the inducing cause to a transfer of property with a small first payment, an inducement which disappears when an assignment is made to a person who may be entirely unknown to the vendor, and unreliable. In cases of this kind it may therefore be deemed advisable to insert a clause in the land contract that, at the option of the vendor, when any assignment of property is made by the vendee, the assignee

shall pay to the vendor a certain portion of the unpaid balance, such amount to be determined, of course, at the time of the execution of the land contract. Such additional payment should offset any loss through the moral and financial instability of the prospective assignee. This clause will, in most cases, have the same effect as a non-assignment clause in that it affords the vendor all the necessary protection, but removes from him the power of any arbitrary action.

§ 9. To What the Vendee Is Entitled.—(a) That possession shall be given to him on the date of closing: if that cannot be arranged that he be allowed a reasonable amount for use and occupation by the vendor, his tenants or lessees until possession is delivered.

(b) If the vendor has collected rentals from tenants in advance, the vendee shall receive the unused portion of such rentals from the date of closing.

(c) That vendor shall furnish an assignment of all leases or agreements which may affect the property, the vendee to assume the rights and obligations of the vendor thereunder.

(d) That the vendor shall pay or make provision for payment of all taxes and assessments levied on the property preceding the time of sale, including any installments of assessments levied but not paid, payment of which, however, extends in the future.

(e) That vendor shall furnish an abstract of title, showing a good and merchantable title in himself if the ownership of the property is by fee; if not, a merchantable title in the owner from whom the vendor derives his interest.

(f) If the interest of the vendor is acquired by a land contract, the provisions with which the vendee is to comply must not be any more strict than those which vendee will ultimately have to assume and which are contained in the present land contract; if they are more strict the vendee must be careful that he is fully protected.

(g) If the vendor does not own the property in fee but has only a land contract interest, the only way in which to establish the chain of title or interest in the property, would be by the vendor furnishing to the vendee copies of the land contract under which he himself is acquiring the property, and if his

vendor has a similar interest, then also a copy of such contract. In addition thereto the vendee should have the privilege, as often as necessary, to inspect the contract under which his vendor is purchasing the property for the purpose of determining if the payments are properly made by him.

(h) The vendor should also enter into a covenant to pay and discharge any and all of the obligations undertaken by him under his own land contract, if he has only a contract interest in the property, and in the event of his default, the vendee should have the right to discharge the obligations of the vendor, the amount of such payment automatically to constitute a credit on his contract. It may also be advisable to provide that default on the part of the vendor for a certain number of times shall subrogate the vendee to all the rights of the vendor in the vendor's contract.

(i) When the length and character of the tenancies, and the rentals received are inducements for the purchase of the property, the vendee should receive a statement signed by the vendor, giving the names, the amounts of rental, and the nature of the tenancies.

(j) Interest on any mortgage which the vendee may have to assume eventually when the vendor's interest in the property up to the amount of such mortgage has been paid shall not exceed the interest payable under the terms of the land contract.

(k) That the vendor shall discharge and pay all payments of principal and interest on any mortgage which may exist against the property, until the vendee's obligation under the land contract has been reduced to the amount of the mortgage; and that payments on land contract should be suspended if the vendor defaults in such payments, the vendee reserving the right to apply the payments due from him towards reducing or discharging the mortgage.

(l) That if the vendor has had erected any new building within a period of sixty days preceding the time of sale to the vendee, some definite assurance either by way of written waivers of mechanics' liens or otherwise should be furnished the vendee to avoid the possibility of the vendee becoming involved in any litigation by reason thereof.

(m) That all insurance policies covering the buildings shall set forth the nature of the vendee's interest in the property, and the amount of the insurance carried should be sufficient to cover the interest of the vendee as well as the vendor and mortgagee or mortgagees.

CHAPTER II

STATUTE OF FRAUDS SUFFICIENCY OF THE PRELIMINARY AGREEMENT ORAL CONTRACTS PARTLY PERFORMED MISCELLANEOUS

- § 10. The Statute of Frauds—General Considerations.
- § 11. Auction Sales—Sufficiency of Memorandum.
- § 12. Statute of Frauds—What Contracts Affected by.
- § 13. Agreements Pertaining to Real Estate Held Not Within Statute of Frauds.
- § 14. Statute of Frauds Surrender or Release of Interests.
- § 15. The Memorandum May Consist of Letters, Telegrams and Detached Writings.
- § 16. Aiding Memorandum by Parol Evidence.
- § 17. Provisions of the Preliminary Contract.
- § 18. Essential Elements of Preliminary Contracts for Sale of Real Estate.
- § 19. Effect of Void Agreements Under Statute of Frauds.
- § 20. Effect of Part Performance of Oral Agreement to Sell Real Estate—General Considerations.
- § 21. Actions at Law on Verbal Contracts Partly Performed.
- § 22. When Disposal of Land Contract in Escrow Advisable.
- § 23. Loss by Fire Pending Purchase.
- § 24. Sufficiency of Tender of Performance.
- § 25. Pleadings and Briefs in Late Michigan Cases.

OGOOSHEVITZ v. SAMPSON, 211 Mich. 184—

- (a) Statement of Fact.
- (b) Brief for Plaintiff.
- (c) Brief for Defendant.

COOPER v. PIERSON, 212 Mich. 659—

- (a) Statement of Fact.
- (b) Brief for Plaintiff.
- (c) Brief for Defendant.

§ 10. The Statute of Frauds—General Considerations.—By reason of the statute of frauds, all contracts for the sale of real estate are absolutely void unless in writing and signed by the vendor. Generally speaking, no oral contract has any value whatever except that in a certain class of cases an oral contract

which has been partially performed may be enforced in a court of equity.¹

The statute of frauds provides² that every contract for leasing for a longer period than one year or for the sale of lands or any interest in lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or the sale is to be made, or by some person thereunto by him lawfully authorized by writing.

The Michigan Supreme Court has construed this statute in many cases³ and has uniformly held that such contracts are

1. See Sec. 20, Post. Effect of oral agreement partially performed.

2. Compiled Laws, 1915, Sec. 11977. "Every contract for the leasing for a longer period than one year, or for the sale of lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing. Compiled Laws, 1915, Sec. 11975. No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

3. *Sutton v. Rowley*, 44 Mich. 112. Holding that a verbal agreement to pay for completing certain hydraulic work by conveying a lot

was void and unenforceable. *Hildebrand v. Nippeling*, 40 Mich. 646. Where a son had a claim against his father and the father verbally promised to him a certain farm but did not do so, upon suit by the son, against the father's estate for the amount of his claim, held that the son could not show the value of the farm as a measure of damages, since a verbal promise to convey land is void. *Jesse Scott v. Jonathan T. Bush*, 26 Mich. 418. A verbal agreement for the purchase of lands, with a stipulation that money paid down to apply upon the purchase, may be retained if the purchaser fails to complete the bargain, is all a single contract, and void under the statute of frauds, and if possession of the land is not given, and nothing done in part performance, the money so paid may be recovered back, although the vendor is willing, and offers to convey. A parol agreement between A and B that if A will deed certain lands to B's son, B will give A his note for a specified amount, is void, and A, after deeding the land as agreed, cannot maintain an action against B upon such agreement or upon any implied promise.

void unless executed in compliance with the statute, the only exception to the general rule being verbal contracts which have been partly performed by one of the parties to the contract. Where money has been paid under a void contract for the purchase of lands, it may be recovered in an action at law by the vendee.⁴

A complete and binding contract under the statute of frauds may be gathered from letters, writing or telegrams between the parties if so connected with each other that they may be construed together to constitute one transaction, a subject more fully treated elsewhere herein.⁵

If any promise at all is implied it is against the grantor himself. *Little v. Needham*, 39 Mich. 147. A parol contract to procure a conveyance of an equity of redemption held by a third person, is void. *Rowden v. Dodge*, 40 Mich. 697. And so is a parol agreement for a reservation or exception of part of the realty described in a deed. *Detroit, Hillsdale & Ind. R. R. Co. v. Forbes*, 30 Mich. 165. Or to surrender or to release a parcel of land mentioned in an executory contract for sale. *McEwan v. Ortman*, 34 Mich. 325. A parol agreement to accept a deed of land in part payment of a precedent debt is void, and payment of part of the debt in money and the discharge by the debtor of a mortgage on the land, the legal title to which was in a third person, is not such part performance as will take the case out of the statute. *Colgrove v. Solomon*, 34 Mich. 494. Selecting swamp lands in pursuance of a parol agreement by which the person making the selection was to have an interest therein, is not such part performance as will take the case out of the statute. *Webster v. Gray*, 37 Mich. 37; *Dwight v. Cutler*, 3 Mich.

573; *Bomier v. Caldwell*, 8 Mich. 463; *Wright v. DeGross*, 14 Mich. 164; *Holland v. Hoyt*, 14 Mich. 242; *Climmer v. Hovey*, 15 Mich. 22; *Hogsett v. Ellis*, 17 Mich. 364-5; *Abell v. Munson*, 18 Mich. 312; *Palmer v. Williams*, 24 Mich. 331; *Scott v. Bush*, 26 Mich. 418-29 Mich. 523; *Colgrove v. Solomon*, 34 Mich. 499-500; *Little v. Needham*, 39 Mich. 147; *Curtis v. Abbie*, 39 Mich. 441; *Hillebrand v. Nibbelink*, 40 Mich. 646; *Nims v. Sherman*, 43 Mich. 50; *Ayers v. Gallup*, 44 Mich. 13; *Sutton v. Rowley*, 44 Mich. 112; *Jackson v. Evans*, 44 Mich. 510; *Demoss v. Robinson*, 46 Mich. 62; *Kelly v. Kelly*, 54 Mich. 30; *Dickinson v. Wright*, 56 Mich. 46; *Wardell v. Williams*, 62 Mich. 55; *McDonald v. Maltz*, 78 Mich. 685; *Ducett v. Wolf*, 81 Mich. 312; *Bartlett v. Bartlett*, 103 Mich. 296; *Taylor v. R. D. Scott & Co.*, 149 Mich. 525.

4. See Sec. 19, Post. Effect of void contract. *Adler v. Kalus*, 190 Mich. 86; *Demoss v. Robinson*, 46 Mich. 62.

5. See Sec. 15 Post. The memorandum may consist orally of letters if they are connected by ref-

§ 11. **Auction Sales—Sufficiency of Memorandum.**—Whenever any sale of lands or interest therein shall be sold at public auction, it is not necessary that either the vendor or the vendee shall sign any written memorandum of the sale. It is sufficient to bind both parties, if at the time of the sale, the clerk of the auction enter in a sale book a memorandum specifying the description and price of the land sold and the name of the purchaser, together with auction bills, catalog or written or printed notice of the sale containing the name of the person on whose account the sale is made and the terms of such sale.⁶

Since the statute does not specify any particular class of public sales at auction, there seems to be no reason why the

reference express or implied so as to show on their face that they are related to the same subject matter, but such relation must appear from the contents of the letter or by express reference therein to each other. *Hickman v. Cheney*, 152 Mich. 217, p. 255-188 N. W. 993. Holding various letters between the parties to be sufficient to constitute a contract under the statute of frauds. See also *Ryan v. United States*, 136 U. S. 68 (84-86). In this case certain letters and telegrams between the parties were held to constitute an agreement obligating the owner to sell certain lands in the city of Sault Ste. Marie as a prospective site for Fort Brady. *Raubitschek v. Blank*, 80 N. Y. 479; *Bayne v. Wiggins*, 139 U. S. 210-35, L. Ed. 144; *Swollow v. Strom*, 83 Minn. 87; 85 N. W. 942; *Walsh v. Brannard* (Minn. 1905), 103 N. W. 1031; *Seymour v. Warren*, 179 N. Y. 1; N. E. 260; *Gates v. Paul*, 117 Wis. 170; 94 N. W. 55; *Lyman v. Robinson*, 96 Mass. 14; *Uran v. Coates*, 109 Mass. 587; *Williams v. Smith*, 161 Mass. 48; *Lee v. Butler*, 167 Mass. 426; *Hibbard v. Hatch Stor-*

age Battery Co., 174 Mass. 296; *Hickey v. Dale*, 66 N. H. 336; *Otis v. Payne*, 86 Tenn. 663; *Wills v. Rose*, 77 Ind. 1; *Thames Sand & Title Co. v. Deville*, 100 Ind. 309; *Gustin v. Davis*, 129 Ind. 472; *Kingsbury v. Burnside*, 58 Ill. 310; *Knight v. Cooley*, 34 Iowa 218; *Matteson v. Scofield*, 26 Wis. 671; *Hickman v. Cheney*, 155 Mich. 217 (255); 118 N. W. 993.

6. By an amendment to the statute of frauds (Act No. 83, Public Acts of 1917), the following proviso was added: "That whenever any lands or interest in lands shall be sold at public auction and the auctioneer or the clerk of the auction at the time of the sale enters in a sale book a memorandum specifying the description and price of the land sold and the name of the purchaser, such memorandum, together with the auction bills, catalog or written or printed notice of sale containing the name of the person on whose account the sale is made and the terms of sale, shall be deemed a memorandum of the contract of sale within the meaning of this section."

same should not apply and control in both judicial sales as well as those where the individual voluntarily sells his property at public auction.

§ 12. Statute of Frauds—What Contracts Affected By.—“The statute covers every imaginable case where an interest in land is divested by any act of the party concerned. It applies to surrenders as well as transfers and excludes the idea that there can be any waiver unless it is written.”⁷ This the statute has been held to apply to oral contracts of partnership for the purpose of dealing in land and a contract of this character has been held void under the statutes,⁸ the statute has also been held to apply to an equity of redemption,⁹ to easements in land,¹⁰ to a right of way across land,¹¹ to an agreement for permission to extend a spur track across land.¹² It also applies to the sale of standing timber and such a sale unless in writing is void,¹³ however, a verbal agreement for the sale of standing timber has been construed by the courts to give to the assignee a license to enter and to cut the standing timber which license is valid until revoked.¹⁴

7. The statute of frauds covers every imaginable case where an interested is divested by any act of the party concerned. It applies to surrenders as well as transfers, and excludes the idea that there can be any waiver (if there be such an act concerning lands), unless it is written. The language used is “No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him law-

fully authorized by writing. *Whiting v. Butler*, 49 Mich. 144.

8. An oral contract of partnership for the purpose of dealing in lands is void under the statute of frauds. *Nestor v. Sullivan*, 147 Mich. 493.

9. *Nims v. Sherman*, 43 Mich. 51; *Rawson v. Dodge*, 40 Mich. 690.

10. *Miller v. Reeves*, 1 Mich. 110.

11. *D. H. R. R. Co. v. Forbes*, 30 Mich. 175.

12. *Dumner v. V. S. Gypsum Co.*, 153 Mich. 622.

13. *Russel v. Meyers*, 32 Mich. 522; *Johnson v. Moore*, 28 Mich. 3.

14. *Spaulding v. Archobold*, 52 Mich. 365; *Greeley v. Stellison*, 27 Mich. 153; *Sovereign v. Orلمان*, 47 Mich. 181; *Wallace v. Kelley*, 148 Mich. 338; *Newberry v. Chicago Lumber Co.*, 154 Mich. 84.

§ 13. Agreements Pertaining to Real Estate Held Not Within Statute of Frauds.—The statute of frauds in requiring contracts for the sale of or landed interests to be in writing contemplates transactions between principals and does not cover a bargain between a principal and his agent, whereby the latter is to be paid for his services in obtaining from the sale of land a certain proportion of the profits under subsequent sale,¹⁵ nor does the statute of frauds apply to an agreement made between parties as to how much each should contribute to the purchase money to be paid for the purchase of land,¹⁶ nor is an oral agreement to divide the profits on the purchase or resale of real property within the statute where the interests claimed by the defendant was by way of compensation,¹⁷ the legal principle deducible from these holdings seems to be that where the agreement relates to a division of the proceeds from the sale of land or any interest therein, it will not be within the statutes and therefore enforceable.

§ 14. Statute of Frauds Surrender or Release of Interests.—In general it may be stated that any surrender or release of a vested interest in real estate whether it is by land contract or deed must be in writing, otherwise under the statute of frauds the same will be void. The statute using the language "Subscribed by the party creating, granting, assigning, sur-

**Agreements Pertaining to Real
Estate Held Not Within
Statute of Frauds.**

15. "An oral agreement to divide the profits on the purchase and resale of real property, where the interest claimed by defendant was by way of compensation for services rendered in removing houses and relocating them, and not for any interest in lands, is not within the statute of frauds." *Thompson v. Hurson*, 201 Mich. 685.

16. "The statute of frauds in requiring contracts for the sale of lands or landed interests to be in writing, contemplates transactions between principals; it does not

cover a bargain between a principal and his agent, whereby the latter is to be paid for his services in obtaining lands, a certain proportion of the profits on their subsequent sale." *Carr v. Leavitt*, 54 Mich. 540.

17. "An oral agreement between four persons who were interested in an estate of a decedent, and who entered into a written contract to buy the dower and homestead rights of the widow, that one of the four should pay \$500 and one-fourth of the amount to be given the widow, was not void under the statute of frauds." *Stevens v. Jackson*, 180 Mich. 131.

rendering, or declaring the same," hence where a grantor in a deed has in writing reserved the right to repurchase within five years, this right cannot be surrendered verbally,¹⁸ this rule has been applied to the interests of a vendee under a land contract even though the contract was wholly executory and nothing has been done under it.

In such an instrument the interest of the vendee thereunder cannot be surrendered or transferred except in writing,¹⁹ as against the foregoing decision it has been held that where the vendee with the consent of the vendor pursues a course of conduct inconsistent with the retention of any interest in the premises and the rights of third parties have intervened,²⁰ a surrender or release of the property will be held to have been

18. *Grover v. Buck*, 34 Mich. 519.

19. It is not competent in defense to a promissory note given for a part of the price named in a written contract for the purchase of lands, to show that the parties to the land contract had an oral arrangement at the time the note and contract were made, that the purchaser was to have the option of retaining the contract and paying the note, or surrendering the contract and thereby discharging his liability on the note; this would be to import into a written contract a verbal stipulation quite inconsistent with its terms. Such a stipulation as was here sought to be shown would be void under the statute of frauds unless in writing, so that the offer was not merely to show by parole a change in the terms of a written contract, but to show such an agreement as could not under any circumstances have been made by parole. *John McEwan v. Charles L. Ortman*, 34 Mich. 324.

An attempt to surrender a land contract by delivering it to one of

the vendors upon his suggestion that he will be satisfied to accept the contract and "let the interest go" but will have to consult the other vendor, is uneffectual without the vendor's consent. The interest of contract purchasers in land cannot be surrendered by parole. *Grunow v. Salter*, 118 Mich. 148.

20. In this state the doctrine of estoppel cannot, however, be applied for the purpose of conveying title. *Hoyes v. Livingston*, 34 Mich. 388. It is true, as held in *Sullivan v. Dunham*, supra, that the statute of frauds in providing that a surrender of any interest in lands must be in writing, does not prevent one who has given back a land contract held by him in order that the land may be conveyed to another, from recovering the consideration for which he gave it up, as by bringing suit he ratifies the conveyance, and precludes himself from claiming any interest in the lands. In the present case the land was not received back by the grantor; nor did he or his grantee make any sale of it to a third party,

made by operation of the law.²¹ Thus where a vendee agreed with his vendor orally that he would surrender his interest in the premises and rent them of the vendor followed by the actual payment of rent as a tenant, was held to be a sufficient

or attempt to do so. There was, therefore, no surrender by operation of law.

Instances of Surrender by Operation of Law

21. A lessee, in violation of his covenant not to assign the lease or sublet the leased premises without the written consent of the lessor, assigned the lease. The assignee made a second assignment, and, at the request of the lessee, the lessor consented to the occupancy of the premises by the second assignee, coupled with the statement that she should look to the lessee for the rent. The second assignee arranged to sell his interest in the lease, and the proposed purchaser and the lessee, the latter representing the second assignee, called upon the lessor, who, as she testified in an action brought by her against said proposed purchaser to recover rent subsequently accruing, made an oral lease of the premises to him, while he testified that she consented to his occupancy, but told the lessee that she should look to him for the rent. The lessee testified that the lessor said she was satisfied to let the proposed purchaser take the place of the second assignee so long as he paid the rent, and, if not paid by him, she should look to the lessee for it. The second assignee thereupon surrendered the premises to the proposed purchaser. And it is held that these negotiations and circum-

stances may have amounted to a surrender of the term, and a leasing to the proposed purchaser, which questions were properly submitted to the jury. *Youell v. Kridler*, 105 Mich. 344.

A by deed leased premises to B, who afterwards assigned the lease to C. A assented to the assignment, and agreed by parol to accept C as his tenant, and to look to him for the rent. Held, that there had been a sufficient surrender of the lease by operation of law, under the statute of frauds, and that A could not afterwards maintain covenant against B for the rent. *Logan v. Anderson*, No. 2 Douglas 100.

Plaintiff leased lands to W for mining purposes; W executed a sublease to defendant and then assigned his interest thereunder to plaintiff. Soon thereafter a corporation was formed to operate the mine, to which the sublease was assigned by defendant. A number of written agreements changing the terms of the sublease were made between plaintiff and the corporation, of which defendant had knowledge, he being an officer of the corporation, but to which his assent was not requested, and no demand was made on him for any payments under the lease for eleven years, when this action was brought to recover the same. Held, that the lease was surrendered by operation of law, as to defendant, plaintiff having accepted the cor-

surrender of the contract by operation of the law.²² It has also been held that where a party had entered into a contract to purchase a tract of real estate for \$20,000, paying \$1,000 down, the deeds having been deposited in escrow in a bank to be delivered upon the payment of the remainder of the purchase price, that the statute of frauds would require a release of the interest of the vendee in such contract to be in writing before the same could be released or surrendered.²³ Where, however, a husband holding a piece of real estate with his wife as vendees under a land contract directed upon the final payment of said contract that the deed to such property should be made to his wife individually instead of to him and thereafter he acquiesced in such transaction for a period of seven years or more, he will be estopped from claiming any interest in such property by reason of having formerly held the same with his wife by entirety.²⁴

§ 15. The Memorandum May Consist of Letters, Telegrams or Detached Writings.—Where an offer clearly and explicitly contains the essentials required by the statute—namely, a description of the land, an offer to sell at a specified price and the time or times and manner when the payments of the price are to be made, and when such offer is followed by an unqualified acceptance, written, signed and delivered either to the postal authorities, or to a telegraph company for transmission, a valid contract results and both parties will be bound.²⁵

puration as her tenant. *Gingrass v. Mather*, 128 Mich. 582.

Where the vendee went to the vendor and turned over his contract to him without any execution of any written release or surrender for the purpose of permitting the vendor to sell to a third person, the court held that by his conduct the vendee had acquiesced in what the vendor proposed and was precluded from asserting any farther rights under the contract. *Sullivan v. Dunham*, 42 Mich. 521.

22. *Underwood v. Slaght*, 213 Mich. 391.

23. *Waller v. Lieberman*, 214 Mich. 441. To the effect that the interest of a contract purchaser in land can be surrendered by parol, see also *McLaughlin's Estate*, 126 Mich. 1.

24. *Steven v. Wackeman*, 213 Mich. 560-567.

25. *Corning v. Loomis*, 111 Mich. 23. Defendant wrote to plaintiff, offering to purchase certain land

for \$250.00 payable \$25.00 at a specified date, and \$25.00 every six months after the first payment, stating that he would improve the premises \$50.00 worth the first year, and would set out fruit trees. Plaintiff answered accepting the terms of the offer, agreeing to charge defendant with the land upon his books, to credit him with all payments, and to give a deed when payments were completed. A subsequent letter from plaintiff to defendant had indorsed thereon the terms of the contract as proposed by defendant. Held, that the writings constituted a valid contract of sale. *Word v. Davis*, 154 Mich. 413. Holding that a certain offer was withdrawn before acceptance. *Wilcox v. Cline*, 70 Mich. 519. The contract sought to be enforced reads as follows: I will sell lots 1, 2, 3, 4, 5, 6, 7 and 8 of outlet 193, Rivard Farm, Detroit. Wayne Co., Mich., for \$17,500.00 payable \$8,000.00 cash, balance \$2,500.00 per annum, with interest annually from April 1, 1887, at five per cent. Upon payment of pro rata amount, lots to be released from mortgage for purchase money payments may be made by pro rata amounts at any time, on any lot or lots of subdivision with interest at five per cent to time of payment, or any of above payments may be made at any time before due. Payments to be made to David Preston, banker, and releases to be had through him upon such payments. This option is given to Alfred F. Wilcox until April 1, 1887, and, if not then accepted, to be void. *Geo. T. Cline*, Bellefontaine, Ohio, February 1, 1887. It is hereby agreed by both parties to the above that

the above agreement shall not be recorded. Then complainant wrote as follows: I have decided to, and do hereby accept your written proposal of February 1, 1887, to sell me lots 1, 2, 3, 4, 5, 6, 7 and 8, of outlet 193, Rivard Farm, in this city, and am prepared to comply with the terms of said proposal. Will you forward deed to Mr. Preston, or some one here, for delivery, on receipt of the deed, payment and mortgage specified in your proposal, or how will you arrange for the transfer. Trusting there will be no delay in concluding the matter, I await your early reply. Very truly, A. F. Wilcox. He also testified that on March 31, 1887, he wrote his acceptance upon said contract as follows: I accept the above proposition this 31st day of March, 1887, Alfred F. Wilcox. Holding that a valid contract resulted which could be specifically performed. *Kempner v. Cohn*, 42 Ark. 519. In this case the parties lived sixty miles apart, the places between which there was mail communication twice a day, Kempner in response to a request from Cohn on January 30th, wrote stating his terms of sale. Three days later Cohn had the title examined and secured the money to pay for the land February 7th. Before receiving notice of Kempner's withdrawal of his offer, Cohn wrote accepting it and arranging to close the transaction at once. Held, there was a complete and binding contract. *Matteson v. Schofield*, 27 Wis. 671. Was held that where there is a distinct offer of sale specifying the terms and describing the property and the offer is at once closed by an unqualified acceptance, the con-

Where the acceptance contains any qualification of the offer, changing or modifying the terms in any particulars, then such qualified acceptance will not result in a binding agreement.²⁶

Where an offer is made same may be withdrawn at any time before acceptance. It is not a sufficient communication of acceptance to render the contract mutual and binding under the statute of frauds that a written acceptance executed by a proposed purchaser was delivered to a third person; a business associate of such signer and was delivered to the vendor although the fact of acceptance in writing was brought home to his knowledge in writing.²⁷

Letters may be considered from the seller to the buyer relating to an agreement to sell land for the purpose of supplying any deficiency in the memorandum.²⁸

tract is complete and capable of legal enforcement. *Ryan v. United States*, 136 U. S. 68. In this case certain letters and telegrams between the parties together with the orders of the War Department were construed together and were held to constitute an agreement binding upon Ryan to sell to the United States certain land of the City of Sault Ste. Marie. *Swallow v. Strom*, 83 Minn. 87. It was held that the memorandum may consist wholly of letters if they are so connected by reference express or implied that they show on their face they relate to the same subject matter. See also *Walsh v. Branard* (Minn., 1905), 103 N. W. 1031; *Seymour v. Warren*, 179 N. Y. 1 N. N. E. 260; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55; *Lyman v. Robinson*, 96 Mass. 14, Allen 242; *Uran v. Coates*, 109 Mass. 587; *Williams v. Smith*, 161 Mass. 48; *Lee v. Butler*, 167 Mass. 426; *Hibbard v. Hatch Storage Battery Co.*, 174 Mass. 297; *Hickey v. Dale*, 66 N. H. 336; *Otis v. Payne*, 86 Tenn. 663; *Wills v. Ross*, 77 Ind. 1; *Thames Sand &*

Tile Co. v. Deville, 100 Ind. 309; *Gustin v. Davis*, 129 Ind. 472; *Kingsbury v. Burnside*, 58 Ill. 310; *Knight v. Colley*, 34 Iowa 218; *Matteson v. Scofield*, 26 Wis. 671; *Hickman v. Cheney*, 155 Mich. 217, 118 N. W. 993.

26. Acceptance modifying or changing offer. In the following cases the offeree made some change in the offer so that it was held that his acceptance was conditional and therefore not binding. *Palmer v. Marquette, Etc.*, Mill Co., 32 Mich. 274; *McElvoy v. Buck*, 35 Mich. 434. *Gannon v. Stansfield*, 216 Mich. 441. Where the defendant, owner of land, in accepting plaintiff's offer to buy with a cash payment and a six per cent three-year mortgage for the balance, changed the terms by adding "seven per cent thereafter." An oral acceptance by the plaintiff of defendant's change in the terms was insufficient to satisfy the statute of frauds and specific performance would be denied.

27. *Hollingshead v. Morris*, 172 Mich. 127.

28. *Baller v. Spiback*, 213 Mich. 921.

Thus where an extension on an option signed by one of three vendors, vendees in common supplied the data lacking in the original option the two should be read together, and may be held binding on the vendor so signing, but not on the others who executed the original option only.²⁹

§ 16. **Aiding Memorandum by Parol Evidence.**—Where the agreement to purchase lands is sufficient to comply with the statute of frauds, in the absence of fraud or mistake, it is error to admit evidence of any other agreement or understanding not embodied in the memorandum, nor can such writing be contradicted by parol evidence.³⁰ Thus, where upon the final closing of a transaction, the vendor sought to place a restriction in the contract, claiming it was orally understood from the first that such restriction was to form a part of the contract, and the memorandum of agreement said nothing about such restriction, the court held that parol evidence thereof was not admissible,³¹ and in a suit for the specific performance of a land contract, testimony of the vendor that it was orally agreed at the time the memorandum was signed that it should be considered abrogated unless the vendor's title should be cleared up within two months, was inadmissible to vary or add to the writing that contained no such conditional clause, the memorandum being conclusive as it contained the requisites of a valid contract.³² And where a lease required by the statute of frauds to be in writing, provided for a certain definite rental, parol evidence that the lessee orally consented to pay an increased rental is inadmissible to modify the terms of such written lease.³³

Parol evidence, however, is admissible to show that a preliminary agreement, complete in itself, was delivered conditionally. Thus, where a written order was given for the purchase of goods upon an oral understanding that a previous

29. *Cooper v. Pierson*, 212 Mich. 657.

30. *Ogooshevitz v. Sampson*, 211 Mich. 180; *Mull v. Smith*, 132 Mich. 618; *Smith v. Mathias*, 174 Mich. 262; *Ogooshevitz v. Arnold*, 197 Mich. 203; *Welch v. Oakman*, 199 Mich. 188.

31. See *Ogooshevitz v. Sampson*—*Supra*.

32. *Smith v. Mathias*—*Supra*.

33. *Miles v. Shreve*, 179 Mich. 671.

written order was to be cancelled, it was permissible to show such oral agreement by parol evidence.³⁴

Parol evidence is likewise admissible where the description is abstract and of a general nature for the purpose of identifying property. Said the court on this point in one Michigan case: "The degree of certainty with which the premises must be denoted is defined in many books and cases are extremely numerous in which the subject has been illustrated. They are not all harmonious, but they agree in this: That it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property." In the case in which the court used this language a written proposition to sell all my entire rights, title, and interest in the lands * * * or standing in my name, for a certain definite price, was held to be sufficient,³⁵ but whether the description answers the requirements of the statute must be determined on the face of the papers before the admission of testimony to connect the contract with the property.³⁶

§ 17. Provisions of the Preliminary Contract.—Many contracts executed preliminary to the regular form of land contract are defective in that they do not state sufficiently the terms of the land contract to be subsequently entered into. This is especially true of those preliminary agreements for the purchase of real estate, drawn by real estate brokers and others not skilled in the drafting of contracts. Frequently, the down-payment is made in a real estate office, and the preliminary agreement is executed in the form of a brief receipt containing only a small fraction of the terms and conditions

34. *Cleveland Refining Company v. Dunning*, 115 Mich. 238; *Ada Dairy Association v. Mears*, 123 Mich. 470.

35. *Eggleston v. Wagner*, 46 Mich. 618.

36. *Eggleston v. Wagner*—*Supra*.

which the parties expect later to be embodied in the land contract. While such contracts may be sufficient to support specific performance and to satisfy the statute of frauds, they may not be sufficiently definite with reference to the provisions of the land contract to be later executed as to enable the vendee to enforce specific performance of such a contract as would fully protect him.³⁷ Many of such agreements contain important omissions necessary for the protection of both parties.

Every preliminary agreement for the execution of a land contract, in addition to containing the essential elements required by the statute of frauds, namely: The parties, description of the property, the purchase price, the terms of payment and time of performance, should as the occasion may require deal with the following additional subjects:

(a) Date possession of the property shall be given to the vendee, and the amount to be paid upon the execution of the land contract.

(b) Payment of taxes, and special assessments, payment of insurance premiums, and who shall have the right to designate the company in which such insurance shall be effected.

(c) Keeping premises in repair or in condition as when sold.

(d) In case of a mortgage on premises, assumption of mortgage by vendee, when contract shall be paid down to the mortgage, if that is desired.

(e) If property vendor is selling is encumbered, such encumbrance should be excepted from the covenant to furnish an abstract showing clear title.

(f) Provision respecting the adjustment of rental collected in advance.

(g) How soon abstract shall be furnished, and what firm shall issue such abstract.

(h) Length of time vendee shall have to examine same.

(i) If abstract shall disclose defects in title, which are readily correctable, how long shall the vendee have to correct such defects.

37. *Brin v. Michalsky*, 188 Mich. 401. Holding that where the preliminary agreement failed to specify when the vendee was to have possession, such an omission would

not nevertheless vitiate the agreement, but would enable the vendor to retain possession until the contract has been paid out in full.

(j) Shall the contract contain a clause against non-assignment.

(k) If vendor does not hold legal title, but is himself buying on a contract, reference should be made to this fact, and the contract should be so drafted that the vendor contracts to show a merchantable title at date of closing, not in himself, but in the party holding legal title of record. In such cases, for the protection of the vendee, contract should contain a provision requiring vendor to exhibit his original contract, from time to time, so that the vendee may be satisfied that his payments are being kept up, and should also authorize vendee, in the event vendor fails to make the payments on his original contract, to make such payments on his behalf, and take credit for such payments thus made on his contract. The vendee's contract should also contain a provision prohibiting vendor from assigning his original contract without notice to his vendee, and requiring the assignee of said vendor to enter into an undertaking, agreeing to carry out the contract between vendor and vendee. While the sale of property by a vendor held only on land contract by the execution of a second contract is attended with considerable risk, the profession cannot ignore the fact that there are individuals who are willing to take that risk, and when they do, their interest should be safeguarded as far as possible.

Provision respecting the forfeiture of the land contract upon default by the vendee, and what notice, if any, should be required.

In the absence of special provisions covering these matters in the preliminary agreement, it is very doubtful if either party can compel the other to accept a land contract containing any stipulations or provisions not covered by the preliminary agreement. The additional terms above referred to vary quite widely in different forms of land contracts, and if the preliminary agreement simply calls for the execution of a land contract without providing what particular form is to be used, I am unable to see how such land contract could, over the objection of either party, be made to contain any terms not embodied in the original agreement.

§ 18. **Essential Elements of Preliminary Contracts for Sale of Real Estate.**—The contract or memorandum for the sale of real estate to meet the requirements of the statute must possess the following essentials:

(a) The contract must contain a description of the land, sufficiently definite that from it the premises may be identified. It is not essential that the description describe the property by lot number or by metes and bounds as it has been held that a description referring to the property by street number, and in other cases by such general terms as "my house," "The Schoolcraft Store," and other similar terms, is sufficient.³⁸

Description Held Sufficient Under the Statute of Frauds

38. *Nowicki v. Kopelczak*, 195 Mich. 678. A description of real estate in a contract described as No. 1086 Chene Street, corner of Frederick in the City of Detroit, Wayne County, Michigan, was held sufficient.

Cooper v. Pierson, 212 Mich. 659. The description of the option in this case was held sufficient, merely describing the lots as Lots Nos. 831, 833 and 835 North Saginaw Street, not giving the city, county, or state. An extension to this option, however, was given which described the property as Lot No. 821 North Saginaw Street, Flint, Michigan. The extension was held to contain a sufficient description.

Mull v. Smith, 132 Mich. 618. Holding as description, the Burns Farm sufficient.

Austin v. Dolbee, 101 Mich. 292 (294).—Holding that a deed which describes the land as all my right title and interest in and to my father's estate at law in the S. S. Austin Est. was sufficient to convey the real estate. *Bawden v. Hunt*, 123 Mich. 296. Where a description in a deed conveyed to the

grantee a house situated on a certain lot correctly describing the lot was held that the title of the lot passed with the house. *Garvey v. Pankhurst*, 127 Mich. 370. Holding that where one person wrote to another making them a certain proposition to purchase his place, using the expression my place in the letter and the purchaser pursuant to such proposition went on the place, and worked it, held that the contract was sufficient compliance with the statute of frauds. *Francis v. Barry*, 69 Mich. 311, 37 N. W. 353. Where a description of property described as the "Schoolcraft Store" was held sufficient. *Slaver v. Breese*, 36 Mich. 77; *Wiley v. Lovely*, 46 Mich. 83; *Crooks v. Whiteford*, 47 Mich. 286; *Huron Land Company v. Robarge*, 128 Mich. 686. Any description of property whether by street numbers or by a well known name, or other designation by which identity of the premises can be ascertained will be sufficient. *United States v. Sutherland*, 60 U. S. (19 Howell), 363, 15, L. Ed. 666. A tract of land known by name of El Cajon near the mission of San Diego is not void for uncertainty. The same rule is applied in case of *Phelan v.*

In some of the later cases a tendency is noted on the part of the courts to restrict the somewhat liberal rule announced in the text by requiring a more complete description of the real estate sought to be conveyed.³⁹

Poycreno, 74 Calif. 456; Martin v. Lloyd, 94 Calif. 195; Veyer v. Mound City Association, 97 Calif. 659; Hilberg v. Creer, 172 Mich. 505-7. Holding that a description of land by street and house number is sufficient. It is only essential that the description shall identify the property, and, if this result can be attained by proving the identity and location of the land in the description, it will be sufficient. Lyman v. Gedney, 114 Ill. 386. Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37. Where a description of property as, "My title and interest in land," belonging to a certain business was held sufficient. Anderson v. Baughman, 7 Mich. 69. Where a mortgage described the land conveyed as lot 4 of block 1 of the La Fontain farm lying south of the River Road and fronting on Detroit River being now used and occupied with the steam sawmill thereon by the parties of the first part and it appeared that that portion of the La Fontain farm had been platted into four lots or plats which had not been subdivided and that the mill was situated on one No. 4 of the plat and the others were fenced in, used and occupied by the mill, held that the works of Block 1 of this description should be rejected and the mortgage held a valid lien upon lot 4 according to the evident intent of the parties.

39. Clark v. Holman, 204 Mich. 62. In this case the following memorandum was signed by the de-

fendant at an auction sale of real estate:

"This is to certify that I have this day bought through The Louisville Real Estate & Development Co. Lot No. 1, 2, 3 in Block 3, according to the official plan of.....
.....for which I agree to pay \$225.00 on the following terms:
.....cash on day of sale,
balance

"Date Aug. 12, 1914.

"Signature, Geo. Holman."

"Witness:"

Thereafter plaintiff tendered to the defendant a deed to the lots in question and demanded payment of one-third of the purchase price and the execution of notes for the balance. Performance being refused by the defendant, this suit was brought to recover the sum of \$675.00. The plea was the general issue. The lower court directed a verdict in favor of plaintiff. The Supreme Court held that the memorandum was insufficient to support the plaintiff's action.

In Miller v. Beardslee, 175 Mich. 414, a bill was filed to cancel a deed on the ground that the deed as delivered contained no sufficient description of the premises; the real estate is described therein as follows:

"All of certain pieces or parcels of land situate and being in the Township of Oakland, County of Oakland and State of Michigan, and described as follows, to-wit: The west half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$); also the east half

(b) The price, time, and manner of payment must be specified.⁴⁰

(c) If the preliminary agreement refers to a subsequent agreement to be later executed the terms of such subsequent agreement must be clearly stated.⁴¹

A memorandum to be sufficient under the statute must be complete in itself and must leave nothing to rest in parol.⁴²

($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) except eighteen (18) acres off southwest corner; also the northwest corner of the west half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) lying north of property of Michigan Central R. R. Co. "all of Section twenty, Town four, North Range eleven East, Michigan."

The Supreme Court reversed the decision of the lower court granting the relief prayed for in the bill of complaint and on page 416 used the following language:

"It is apparent that when the deed was executed and delivered by the grantor it contained no complete description of land. The words, "Lying north of property of Michigan Central R. R. Co." are the only words employed which can by any possibility aid the description. And these words, in the light of certain testimony which was admitted, are found to afford no real aid because the railroad company had at least a right of way in seven sections in Oakland township. Other testimony, admitted without objection, and not disputed, tended to prove that Alice Smith owned land, otherwise corresponding with the description in the deed, in section 20 in said township, and owned no other land in the township; defendants say that this testimony, having come in without objection, may be properly used to

determine what land was intended to be conveyed and to sustain the deed. We think this is not so."

In the case of *Groppers v. Marshall*, 206 Michigan, page 560, in an action brought to recover damages for a breach of written contract the court held that the following description of the premises was too ambiguous, uncertain and indefinite to form the basis of action for damages.

"All that certain piece or parcel of land situate in the Township of Byron, in the County of Kent and State of Michigan, described as follows, viz: "The east half of the southeast quarter and the southeast quarter of the northeast quarter, less one acre (E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ less 1 A.) of township five north of range twelve west, containing one hundred nineteen acres of land, more or less, according to the government survey thereof;"

40. Where the contract simply specified "Interest 5%, Easy Terms," held too indefinite to satisfy statute of frauds. *Hildberg v. Green*, 172 Mich. 505; *Gault v. Stormont*, 51 Mich. 636; *Adler v. Katus*, 190 Mich. 86. See collection of cases note 15 of this section.

41. See *Webster v. Brown*, 67 Mich. 328.

42. See cases collected in note 53 supra.

If the memorandum fails to name the consideration or purchase price, or to state the time of performance,⁴³ or if the time when payment is to be made is not stated,⁴⁴ or if the memorandum is not complete in itself without resorting to parol evidence,⁴⁵ or if it fails to name the parties, or naming them, only one signs the agreement, where two purport to effect the sale,⁴⁶ or if the contract purports to be made by an agent or indicates on its face that it is so made, and the agent instead of the principal signs same,⁴⁷ in all the foregoing instances the contract is within the statute of frauds and unenforceable.

In the absence of fraud or mistake where a preliminary land contract is complete in itself, it is error for the trial court to admit oral evidence contradicting its provisions to the effect that it did not contain the agreements of the parties.⁴⁸

If the written contract itself is void by reason of falling within the statute, and the party seeking relief can establish the agreement by parol evidence free from doubt and ambiguity, which agreement followed by part performance, sufficient to take the case out of the statute the contract will be upheld.⁴⁹

In construing the provisions of a land contract, a construction is to be preferred, which will render it valid rather than void.⁵⁰

Where the preliminary agreement has been lost, parol evidence is admissible as to its contents.⁵¹

For a more detailed examination of the Michigan cases, disclosing what contracts the courts have held to be a sufficient

43. *Rosenbaum v. T. Tyszka*, 192 Mich. 457. Where the consideration is not named, nor the time of performance.

Tattan v. Bryant, 198 Mich. 515. Where the consideration was not stated.

44. *Nichols v. Buchanan*, 177 Mich. 601.

45. *Ebert v. Cullen*, 165 Mich. 75.

46. *Adler v. Katus*, 190 Mich. 86.

47. *Shipman v. Campbell*, 79 Mich. 82.

48. *Ogooshevits v. Sampson*, 211 Mich. 180; *Smith v. Mathis*, 174 Mich. 262; *Ogooshevits v. Arnold*, 197 Mich. 204; *Walsh v. Oakman*, 199 Mich. 638.

49. *Lyle v. Munsen*, 213 Mich. 250.

50. *Stamp v. Steel*, 209 Mich. 205-210; *Anderson v. Baughman*, 7 Mich. 69-74, Am. Dec. 699; *Morse v. Hewett*, 28 Mich. 481.

51. *Bignell v. Franks*, 212 Mich. 319.

compliance with the statute and what have been held insufficient, the reader is referred to the note accompanying this section where the Michigan cases have been collected and the particular contract passed upon by the courts is either abstracted or set out. We have grouped the cases in which the courts have held the agreements sufficient,⁵² and in another

PRELIMINARY AGREEMENTS FOR THE CONVEYANCE OF LAND HELD SUFFICIENT

52. Under this section we have abstracted the following cases all holding the memorandum sufficient:

Gannon v. Slansfield, 216 Mich. 441; Baller v. Spivack, 213 Mich. 436; Lyle v. Munson, 213 Mich. 250; Ogooshevitz v. Sampson, 211 Mich. 184; Stamp v. Steele, 209 Mich. 205; Ogooshevitz v. Arnold, 197 Mich. 204; Nowicki v. Kopelczak, 195 Mich. 678; Brin v. Michalski, 188 Mich. 400; Bushman v. Faltis, 184 Mich. 172; Hilberg v. Creer, 172 Mich. 505; Goldberg v. Drake, 145 Mich. 50; Huron Land Co. v. Robarge, 128 Mich. 686; Mull v. Smith, 132 Mich. 618; Garvey v. Pankhurst, 127 Mich. 370; Bawden v. Hunt, 123 Mich. 296; Austin v. Dolbee, 101 Mich. 292; Munro v. Edwards, 86 Mich. 91; Lambert v. Weber, 83 Mich. 395; Francis v. Barry, 69 Mich. 311; Crooks v. Whitford, 47 Mich. 286; Eggleston v. Wagner, 46 Mich. 610; Wiley v. Lovely, 46 Mich. 83; Slaver v. Breese, 36 Mich. 77; Anderson v. Baughman, 7 Mich. 69; Baller v. Spivack, 213 Mich. 436.

In this case, a memorandum described the property as No. 151 Wilkins Street, four family frame flat in the City of Detroit, County of Wayne and State of Michigan. This contract is peculiar in that the buyers agreed to purchase but the

seller did not agree to sell. This memorandum was followed by a notice on the part of the seller that the abstract was ready, and the court held this latter construed with the memorandum was sufficient to comply with the statute of frauds.

Lyle v. Munson, 213 Mich. 250. This was the case where the parties made a lease in writing, but was void, on Sunday. This lease contained an option of purchase, but was followed by part performance, being certain improvements made on the premises.

The court held the agreement sufficient since followed by part performance.

Ogooshevitz v. Sampson, 211 Mich. 187. In this case the parties entered into the following agreement:

"Received of I. Ogooshevitz \$100 as first payment on lot known as westerly 18 feet of lot seven (7) and easterly 34 feet of lot eight (8) being 52 feet on the south side of Palmer Avenue west of Beaubien Street, for the sum of \$5,720, terms as follows: \$620 more on delivery of land contract or deed, and the remaining \$5,000 on or before one (1) year from the date of

contract, purchaser to receive an abstract brought down to date before the contract is made to show free and clear title. Six percent interest. George D. Sampson."

The court held this agreement sufficient to comply with the statute of frauds.

Mull v. Smith, 132 Mich. 618. "The parties met defendant, who, on being asked to fix his lowest cash price, submitted the following written proposition:

"Freemont, Mich., December 22, 1900. Forty acres for \$650. Mortgage \$250. Leaves balance \$400. Will take cash \$375 for my interest in place. Frank H. Smith."

This was Exhibit 1. Plaintiff accepted this, and paid \$100 down. Defendant gave him a memorandum of the contract, reading as follows:

"Freemont, Mich., Dec. 22nd, 1900. I agree to give to Mr. E. M. Mull a warranty deed of the Burns farm upon payment of \$275, subject to mortgage of \$250. Frank H. Smith."

This was Exhibit A. He also gave him the following receipt: "100.00. Freemont, Mich., 12-22-1900. Received of E. M. Mull, one hundred dollars to apply on payment of Burns farm. F. H. Smith."

The foregoing memoranda held sufficient to satisfy the statute of frauds.

Stamp v. Steele, 209 Mich. 205 (211). In the case of a deed where the property was described as "91 and 95 East Webster Avenue" the court held that a description of street numbers is sufficient.

Bushman v. Faltis, 184 Mich. 172. The complainant's bill in this

case was for the specific performance of an agreement made by the defendant with the plaintiff whereby the defendant was to lease certain land in the city of Detroit for ninety-nine years. The agreement acknowledged receipt by the defendant of \$250 from the plaintiff as part payment on the first six months' rental; it also contained the amount of yearly rental which was to be charged but no definite time was mentioned for the payment of the rental. The agreement also contained the condition that the lessees could purchase the property from the lessor for a stated consideration at any time within ten years after the execution of the agreement. The agreement being signed by the defendant Faltis.

The defendant argued that the agreement was too uncertain and indefinite to permit of specific performance; that no time for the payment of the rent is fixed, and in the event of sale, the time for the payment of the purchase price is not stated.

The court held that this agreement was not indefinite or uncertain and that specific performance thereof will be compelled of the defendant. The contract provides that the rent shall be a certain amount "per year," this, under the authorities, is synonymous with saying that the rent will be due at the end of the year. Therefore the time for the payment of the rent is stated with sufficient certainty. The agreement here provided an option whereby the purchaser must exercise his right of purchase within a fixed time. The time of payment being fixed, this case is clearly distinguishable from Gault v. Stormont,

51 Mich. 636, and *Ebert v. Cullen*, 165 Mich. 75, cited above; for in both of those cases no time was fixed for the payment of the purchase price.

Ogooshevitz v. Arnold, 197 Mich. 204. In this case the complainant filed a bill against the defendant for the specific performance of an agreement between the plaintiff and the defendant. A clear description of the property, the amount of the purchase price, and the times of payment thereof were all clearly set forth. The defendant was to furnish an abstract brought down to date showing clear title. This the defendant did not do, the abstract he furnished showing some defect in the title. Plaintiff refused to accept title as it stood in the abstract and defendant refused to clear up the defect although it was within his power to do so. Upon plaintiff's refusal to accept the defective title the defendant declared the deal off and this bill is brought by the plaintiff as a result.

The court held that this was such an agreement as will be enforced. That there was nothing ambiguous about this agreement and that it complies with all the requirements of the statute of frauds. The parties, the property, the price, the terms of payment, the time of performance are all definitely fixed. That while it is true that this is not the land contract itself, being an agreement to execute a land contract; still a court of equity may specifically decree the performance of an agreement to execute a land contract. This agreement being complete in itself and satisfying all the requirements of

the statute of frauds will be specifically enforced.

Brin v. Michalski, 188 Mich. 400. Complainant filed a bill to compel specific performance of a land contract which he holds as assignee. According to the terms of the agreement the defendant agreed to convey certain property, which is properly described, to the original contractee for \$5,400. The agreement further provided that the purchase price was to be paid \$50 down on the execution of the agreement and the balance in installments, the amount and time of paying said installments being definitely set forth. The plaintiff alleges that she tendered performance in that she offered to pay the amount due on the first installment of the purchase price but that defendant refused to accept same because he had already disposed of the property to another at a higher price.

The court held that this contract is sufficient in all particulars to satisfy the requirements of the statute of frauds. The parties, property, consideration, terms, and time of performance are all clearly stated. Such being the case the court decreed specific performance. The court points out that this agreement is clearly distinguishable from *Gault v. Stormont*, 51 Mich. 636, in that here the time for the payment of the purchase price is plainly stated while in the previous case no time for the payment was mentioned.

Goldberg v. Drake, 145 Mich. 50. Plaintiff brought suit to recover damages for the breach of the following agreement between himself and the defendant:

"Memorandum of agreement made this 29th day of April, A. D. 1904, between Samuel T. Goldberg, party of the first part, and Soledad Drake, party of the second part, in the manner following: The said party of the first part, in consideration of the sum of \$25.00 to him paid upon the signing of this agreement, hereby agrees to sell unto the said party of the second part all that certain piece or parcel of land situate in the City of Kalamazoo, County of Kalamazoo, and State of Michigan, and more particularly known and described as follows, to wit: House and premises on West Lovell street on the south side thereof, the premises being the third lot west of the intersection of Park and Lovell streets.

"The said party of the first part hereby agrees to sell the said premises to the said party of the second part for the sum of \$4000 (four thousand dollars), and that the said party of the second part may have this option for seven days. The sum of \$25.00 paid upon the signing of this agreement to apply upon the sum of \$4,000 to be paid in full for said premises.

"Sam T. Goldberg.

"I hereby agree to the above the sum of three thousand nine hundred and seventy-five dollars, within seven days.

"Soledad Drake."

The testimony showed that the part of this agreement above plaintiff's signature was signed by the plaintiff on the day of its date and that thereafter the defendant added the clause of acceptance and signed her name. Later the defendant refused to accept a deed for the prop-

erty when tendered by the plaintiff and the latter bring this action.

The court held that this was a valid contract binding on both parties. There is nothing indefinite or uncertain about the contract. The parties, property, consideration and time of payment of said consideration are explicitly stated. Originally this instrument amounted to no more than an option, but when the addendum was added and signed by the defendant, that amounted to an acceptance and was as a matter of fact an unconditional promise to pay the purchase price within seven days. From that time on the purchase was no longer optional with the defendant.

Garvey v. Parkhurst, 127 Mich. 368. This is an action brought by Emma Garvey against the defendant Parkhurst to recover the possession of land occupied by the defendant. Both parties derived title from one Charles Garvey, a son of the plaintiff. Complainant is the mother of Charles and Harry Garvey. On April the 6th, 1896, Harry Garvey wrote to his brother Charles stating that he desired to purchase the premises in question and asked for his terms. To this inquiry Charles replied as follows:

"You asked me what I would do with you about my place. If you want it, I will let you have it for \$150, and you pay the back taxes. I will give you five years to pay it in, but I can't give you a contract until I come home. I don't expect to come home for two years, but you can go on and build a house, and I will give you a contract then. You will have to pay the taxes this summer."

There was no written acceptance of this offer by Harry but he went into possession of the premises relying upon the contract created by the letter. He remained in possession about one year when he assigned all "his right, title, and interest to a certain place," the place spoken of in the letter from his brother to the defendant. The latter went into possession and made improvements. Complainant was displeased because the property had passed out of the family and obtained a quit claim deed to the premises from Charles and then brought this action.

The complainant contended that this alleged contract between the two brothers was void under the statute of frauds, in that the offer above quoted did not contain a sufficient description of the property.

The court held that this contract was sufficient to satisfy the requirements of the statute of frauds. That a description in order to be sufficient under the statute does not have to be a governmental description or a description by metes and bounds. That it is enough if the land is described by name so that it can be identified by extrinsic evidence not contradictory to the contract.

Munro v. Edwards, 86 Mich. 91. Complainant brought a bill to compel specific performance of a memorandum of agreement entered into between the complainant and the defendant. By the terms of this agreement the defendant agreed to sell to the plaintiff certain described property for \$5,150; one hundred dollars of the purchase price to be paid down, and three hundred

as soon as the abstract was completed or within fourteen days from the date of signing the agreement. The plaintiff was to assume a mortgage for \$1,500 then on the place, the amount of the mortgage to be counted in on the purchase price, the balance of the \$5,150 was to be paid within six years. Plaintiff paid the \$100 which was to be paid down but the defendant failed to furnish a satisfactory abstract of title and plaintiff did not pay the \$300 within the fourteen-day period, as the supplying of the abstract was a condition precedent thereto. After the fourteen-day period had elapsed defendant repudiated the agreement. Defendant contends that this agreement is incomplete and lacks mutuality; that plaintiff does not agree to buy the land or to pay the \$300.

The court held that this was such an agreement as may be enforced; that this agreement is signed by both parties, and while the plaintiff does not in express terms agree to buy or pay, by implication he agrees to do both. The property is sufficiently described and the time for the payment of the balance of the purchase price is fixed with certainty.

Chief Justice Champlin delivered a dissenting opinion in which he held that this agreement was not one which should be specifically enforced; that while the property itself is described with sufficient certainty, the time and terms of payment are not stated nor the time when the deed is to be executed; and that an agreement in order to be sufficient under the statute of frauds must be complete in itself and leave nothing to parol.

Lambert v. Weber, 83 Mich. 395. This case arose out of the filing of a bill for specific performance on the part of the plaintiff to compel defendant to convey certain property to plaintiff under the terms of a written agreement entered into between the parties. According to the terms of the agreement the defendants agreed to convey certain described property in the City of Detroit to the plaintiff for twenty-five hundred dollars, twenty-five dollars of which was to be paid down at the time of executing the agreement. The balance of the purchase price was to be paid at the delivery of the deed and a Burton abstract of title, with tax statements of said land. The twenty-five dollars was paid down at the time of executing the agreement and the memorandum was signed by both parties. The defendants had an abstract prepared but there appeared to be some flaw in the title. Negotiations continued between the parties but nothing came from them because defendants did not produce an abstract satisfactory to the plaintiffs or one such as they were entitled to demand. Finally the defendants repudiated the agreement and disposed of the land to a third party and plaintiff brings this bill not only to enforce specific performance of the original agreement but to set aside the subsequent conveyance.

The court held that the plaintiff was entitled to the relief prayed for in this case. The contract did not contain any definite provision as to when the deed should be executed and the money paid but it is plainly evident that the complainants were to have a clear

title. According to the terms of the agreement the money was to be paid, "at the delivery of the deed, and a Burton abstract of title, with tax statements." The parties understood by this that the defendants must show complainants a clear title before they asked them to pay the purchase price. Since defendants did not furnish a clear abstract of title complainants were not in default in refusing payment until such abstract was produced. This contract is certain and definite enough in all particulars to permit of specific performance and to satisfy the requirements of the statute of frauds.

Francis v. Barry, 69 Mich. 311. This was an action for damages brought by the plaintiff to recover for the breach of a contract made by the defendant with the plaintiff, by which defendant had agreed to convey to plaintiff certain property. The contract is based upon numerous letters exchanged between the parties wherein the terms of sale were discussed and finally certain terms were agreed upon. Briefly stated the correspondence shows an offer by the defendant to sell and convey to the plaintiff certain property known as the "Schoolcraft-store Property," for \$2,500, \$2,000 in cash on delivery of deed and the balance to be paid by two notes amounting to \$500 to be signed by the plaintiff and payable from the rents of the store. An acceptance of this offer of defendant's on the part of plaintiff was clearly proved. Subsequent to this agreement between the present parties litigant, the defendant disposed of the land to a third party for \$3,000.

The defendant contends that this agreement which plaintiff sets up is not sufficient to satisfy the requirements of the statute of frauds because there is not a sufficient contract in writing, and also that a sufficient description of the property to be conveyed is not disclosed by the written correspondence.

The court held that a complete and binding contract may be created by letters or other writings relating to one connected transaction, if without the aid of parol testimony, the parties, the subject matter, and the terms of the contract may be collected. That in the instant case these requirements are complied with, the terms of the contract are clear and unmistakable, likewise the parties and subject matter of the contract. The contention of the defendant that there was not a sufficient description of the property is unsupportable; the property was referred to by both parties in the early part of their correspondence as "the Schoolcraft Store" and later as "the property." This later designation assumed a definite meaning in the light of what had gone before and could refer to nothing but the Schoolcraft-store property and such a description is wholly sufficient to identify the property.

Pearson v. Gardner, 202 Mich. 360. The plaintiff in the above entitled case filed a bill for specific performance to enforce an oral contract for the purchase of a house and lot. At the time of this purchase the defendant gave to the plaintiff the following receipt:

"Mamburg, Michigan, June 6 (there is a six and a seven over it), 1917. Received of Edd Gard-

ner and Della Gardner One Hundred Dollars (\$100) on purchase price of house and lot in Hamburg village. Balance of Eighteen Hundred Dollars (\$1,800) to be paid and deed given in five days. A H. Pearson."

This agreement was followed by a surrender of possession to the defendants. Plaintiff prepared a deed for the premises and tendered the deed and abstract of title. Performance on the part of the defendant was again refused. In the meantime the defendant had continued in possession of the property, had changed the partitions therein, trimmed some of the shade trees and harvested the vegetables from the garden. The court held that specific performance should be awarded, citing 36 Cyc., p. 686; *Peckham v. Balch*, 48 Mich., 197; *Cole v. Cole Realty Co.*, 169 Mich. 347; 2 *Pomeroy's Equitable Remedies*, Sec. 747.

Huldberg v. Creer, 172 Mich. 505. Where the option, properly signed, described the property by street number, consideration one dollar, purchase price to be \$5,500, interest 5%, easy terms, held sufficient as to whether it was a sale or a lease and as to the description of the premises.

Huron Land Co. v. Robarge, 128 Mich. 686. A deed purporting to convey all the right, title, and interest in and to the estate, property and effects of a deceased person, be it real, personal or mixed, by the heirs of decedent, is sufficient to pass their interest in decedent's real estate.

Crooks v. Whiteord, 47 Mich. 286. Where ejectment was brought for land in town two, south of

group have placed these decisions wherein the courts have held the agreement insufficient.⁵³

range ten, west in Comstock township, the plaintiff, in support of his title, introduced a deed purporting to convey the same description of land in the township of that name, but describing it as in range nine. Held, that the discrepancy was not sufficient ground to exclude the deed, but that extrinsic evidence was admissible to identify the land conveyed with the premises in suit.

Wiley v. Lovely, 46 Mich. 83. Where a deed described the land conveyed as lot 77 of the original plat of the village as recorded and the original plat only contained 29 lots, with another plat on record designating the lot to be number 78, and still another plat, not recorded, contained the lot as number 77, and that it had been dealt

with for more than 25 years as lot 77, held, that the error in description did not invalidate the conveyance. It is often necessary to resort to parol evidence for the purpose of applying the deed to the subject matter.

Slater v. Breese, 36 Mich. 77. Omitting to name the state, county, and township, in the description of premises mortgaged, will not invalidate the instrument, where other adequate elements of identification exist; and it is not essential that the property should be described so as to identify it without the aid of extrinsic proofs, but it is always competent to connect the written description with the material subject matter by proof of the surrounding circumstances.

PRELIMINARY AGREEMENTS FOR THE CONVEYANCE OF LAND HELD INSUFFICIENT

53. Under this section we have abstracted the following cases, all holding the memorandum insufficient:

Pangborn v. Sifford, 216 Mich. 164; Cooper v. Pierson, 212 Mich. 658; Zimmerman v. Miller, 206 Mich. 600; Groppers v. Marshall, 206 Mich. 560; Clark v. Holman, 204 Mich. 62; Tatten v. Bryant, 198 Mich. 515; Holland v. Holland, 195 Mich. 513; Rosenbaum v. Tyszka, 192 Mich. 457; Adler v. Katus, 190 Mich. 86; Berston v. Gilbert, 190 Mich. 638; Nichols v. Burchman, 177 Mich. 601; Miller v. Bearslee, 175 Mich. 175; Hildberg v. Creer, 172 Mich. 505; Ebert v. Cullen, 165 Mich. 75; Taylor v. Scott & Co., 149 Mich. 525; Kroll v. Diamond Match Co., 113 Mich. 196; Shipman v. Campbell, 79 Mich. 82; Webster

v. Brown, 67 Mich. 328; Wadell v. Williams, 62 Mich. 50; Gault v. Stormont, 51 Mich. 636; Maynard v. Brown, 41 Mich. 298.

Cooper v. Pierson, 212 Mich. 658. In this case a thirty-day option read as follows: "May 26, 1919. In consideration of one (\$1.00) dollar, we, the undersigned, agree to give option to Morris Cooper on lots 831, 833 and 835, North Saginaw Street, for the sum of two hundred sixty and no/100 dollars per front foot. It is agreed that the first payment be made five thousand dollars. Balance to be secured by deed of trust for five years with six per cent. interest. This option will expire on June 26, 1919. Fred D. Pierson,

Robert L. Pierson, Fannie G. Pierson."

This option was followed by a receipt and extension reading as follows:

"\$100.00 June 26, 1919. Received from Morris Cooper one hundred and no/100 dollars, part payment on purchase price of Lots No., known in option furnished to Morris Cooper in option dated May 26, 1919, the revised No. known as Number 821 North Saginaw Street, Flint, Michigan, deed to be drawn on or before 10 days. Fred D. Pierson."

The court held the original option insufficient to satisfy the statute of frauds in that it did not describe the property sufficiently, it not naming the state, county, city or village in which the property was situated, but held that with the extension which was signed by one vendor, the person executing the extension would be bound, citing *Galt v. Stormont*, 51 Mich. 636; *Rosenbaum v. Tyszk*a, 192 Mich. 457; *Groppers v. Marshall*, 26 Mich. 560.

Zimmerman v. Miller, 206 Mich. 600. The parties in this case entered into a form of contract. The defendant refusing to perform, the plaintiff brought an action to recover damages for fraudulent representations; the court held that inasmuch as this contract indicates on its face that the defendant, F. P. Miller, was signing the same on behalf of someone else, it would not become a binding agreement until approved in writing by the vendor.

In *Tattan v. Bryant*, 198 Mich. 515, the litigation arose out of the following agreement in writing which plaintiff contends is a land

contract, and seeks to enforce specific performance of, while the defendant contends it is merely a forfeited option:

"Memorandum of agreement, made and entered into this 13th day of April, A. D. 1914, by and between John A. Bryant, of the City of Detroit, Wayne County, Michigan, hereinafter known as the seller, and Catherine Tattan, of the same place, hereinafter known as the purchaser: In consideration of the sum of one dollar this day paid to the seller by the purchaser, said seller does hereby agree to sell to said purchaser the following described property, to wit: The Woodward Avenue frontage, being the westerly one hundred feet (100) of lots B and two, and the north one-half of the vacated portion of Pallister Avenue of Chandler avenue subdivision of part lot five (5) of subdivision of quarter section 57, ten thousand acre tract, excepting and reserving an easement or right of way on a strip of land ten feet in width from the easterly end of said property, as provided in a certain deed to John Kaiser, Sr.; also including easement and right of way over southerly ten (10) feet of land heretofore deeded to said Kaiser, Sr., on the following terms, to wit: For the sum of twenty-four thousand two hundred dollars (\$24,200) payable five hundred dollars (\$500) on the signing of this agreement and the balance of twenty-three thousand seven hundred dollars (\$23,700) as follows: Twelve thousand two hundred dollars (\$12,200) or more payable thirty days (30) from the date hereof and the balance of eleven thousand five hundred dollars (\$11,500)

as follows: Three thousand dollars (\$3000) one year from date, three thousand dollars (\$3000) two years from date, and the balance of five thousand five hundred dollars (\$5,500) three years from the date hereof with the privilege of paying any and all sums at any time after this date, with interest at 6 per cent. per annum on any sums due and unpaid.

It is understood and agreed between the parties that E. M. O'Roark, real estate agent, who held a prior option on this property, dated March 10th, 1914, which said option has expired, is to receive from the first payment of twelve thousand two hundred dollars (\$12,200) the sum of seventeen hundred dollars (\$1700), which amount is to be paid in full of all claim on his part for commission or otherwise, against either of the parties hereto, or against said property, and said E. M. O'Roark has this day signed this agreement as evidence thereof. It is provided further that if said purchaser shall fail to pay the sum of twelve thousand two hundred dollars (\$12,200) thirty days from the date hereof as agreed, then said payment of five hundred dollars this day made shall be retained by the seller as liquidated damages and this agreement shall at once be cancelled and the purchaser shall forfeit any interest she may have or may claim in said premises. It is understood and agreed that the purchaser has examined Burton abstract, that the title is satisfactory and that upon the completion of the terms of this option and payment of the purchase price for said property, she shall receive a deed warranting

said title against the acts of the seller and a Burton abstract as now brought down and certified.

"In witness whereof, the parties have hereunto set their hands and seals the day and year first above written. John A. Bryant, Catherine Tattan, E. M. O'Roark."

The \$500 payable "on the signing of this agreement" was then paid by the plaintiff as provided. But the plaintiff never paid the \$12,200 which was due, according to the terms of the agreement, thirty days after the signing thereof.

The plaintiff contends that this instrument is a present agreement between the parties for the sale and purchase of land, and not a mere unilateral option contract giving the plaintiff the right to elect to purchase, on or before a certain date. Council for plaintiff further urges that this is a land contract because the agreement contains certain terms, such as "seller" and "purchaser" and that "said seller does hereby agree to sell to the said purchaser" and etc., which are common to land contracts.

The court held: There was no provision in this agreement whereby the plaintiff agreed to purchase; it was provided that she was to receive a deed on compliance with "the terms of this option." After paying the \$500 upon the execution of the agreement there was nothing further imposed upon the plaintiff. She was free to perform the agreement and enforce it or to forfeit payment and abandon it. She was under no obligation to purchase. Furthermore the time limit of thirty days was made the essence of the agreement in clear

and unequivocal terms. By failing to make payment of the \$12,200 within the thirty days specified, plaintiff forfeited her rights under the agreement. Specific performance of this agreement will not be enforced as this is merely an optional agreement.

In *Holland v. Holland*, 195 Mich. 513, the plaintiff brought a bill to enforce the specific performance of the following written agreement between himself and the defendant:

"I hereby agree to deed Gottlieb Holland half interest in the Hotel Smalley property at any time that he may demand a deed. (Signed) Edward Holland. Witness: S. H. Cochran."

The plaintiff contended that this agreement was an agreement to convey land or a land contract and that he was entitled to the specific performance of same.

Held: This memorandum is not sufficient to satisfy the statute of frauds. A memorandum to be sufficient under the statute must be complete in itself and leave nothing to rest in parol. It must contain a description of the property to be conveyed, and the consideration to be paid therefor, and also express definitely the time or times of payment. Applying these requirements as a criterion the above agreement is found to be fatally defective. Even assuming that the description of the property contained in the writing is sufficient, still there is no consideration named and no time mentioned within which said consideration shall be paid. Therefore since no time is fixed for the performance and no consideration mentioned this is not

a contract which a court of equity will enforce.

In *Rosenbaum v. Tyszka*, 192 Mich. 457. Plaintiff brought a bill to enforce the specific performance of the following written agreement which he contends is a contract for the conveyance of land:

"Detroit, Mich., May 29, 1915. Received of Sam and Bella Rosenbaum twenty-five and no/100 dollars, as deposit on house located at 1415 Chene Street, purchase price \$3,450. One thousand will be paid before June 15, 1915. Balance \$300 and interest. (Signed) Kornelia Tyszka."

Defendants refused to convey and set up a defense to this bill the allegation that the alleged contract upon which the bill was predicated was not sufficient under the statute of frauds to bind the defendants to make the sale.

Held: This alleged contract is not sufficient to satisfy the statute of frauds. In order for a preliminary agreement to convey land to be sufficient under the statute, the parties, property, consideration, terms, and time of performance must be clearly stated. The above writing does not contain the terms and the time of performance is not stated. Consequently, specific performance of such an agreement will not be enforced.

Adler v. Katus, 190 Mich. 86. In this case the plaintiff brought suit to recover the money he had paid down under the terms of the following written contract of sale of real property, the agreement being signed by one of the joint owners of the property and also by him for the other joint owner, al-

though the latter had never authorized such signature:

"Received from Hyman Adler the sum of five hundred (\$500) dollars to apply on the purchase money to the amount of twelve thousand five hundred dollars for the following described property, to wit: Lot numbered eighty nine (89), plat of part of P. C. 181, north of Jefferson Avenue, Antoine Rivard farm, subdivided into lots 1841, said lot being situate on the northwest corner of Macomb and Rivard streets, having a frontage of fifty feet on Macomb street and one hundred five (105) feet along the west line of Rivard street to a public alley; the remainder of the purchase money to amount to twelve thousand dollars to be paid as follows: Two thousand (\$2,000) dollars upon delivery of property by land contract and a certified abstract of title for examination on or before September 1, 1914, provided papers are completed by that date, and the remaining ten thousand dollars in quarterly payments of two hundred fifty (\$250) dollars or more, payments to include principal and interest at the rate of six per cent. per annum.

"In addition thereto, the purchaser agrees to discharge, when due, all taxes and assessments and to keep property fully covered by insurance in amounts approved by the seller, said policies to be held by the seller in escrow until such time as the property has been fully paid for.

"It is understood that the purchaser is to draw all rents from and after the date of the land contract when the two thousand dollar payment has been made. Peter

Katus, Charles J. Katus, by Peter Katus.

"I do hereby agree to purchase the property above described and on the terms and conditions herein set forth. H. Adler. Aug. 15, 1915. Detroit, Michigan."

The plaintiff contends that the contract is void under the statute of frauds and that he is entitled to recover the money paid to the defendants as paid without consideration; while the defendants argue that it is binding upon Peter Katus at all events and that plaintiff cannot recover.

Held: If a promise to convey the land is to be implied from this memorandum it is a joint promise of Peter and Charles J. Katus and not of Peter Katus alone. The money is received by both and if any conveyance is implied it is a joint conveyance. This cannot be construed as a contract made by Peter alone. Since it cannot be construed as made by Peter alone and since he had no authority to sign the name of Charles, the agreement is void as to Charles, and since it is void as to Charles and not a severable agreement, the whole agreement is entirely void. Inasmuch as the contract was not sufficient to satisfy the statute of frauds since it was not signed by the parties thereto, the plaintiff could not have compelled specific performance of the defendants, therefore since the contract is void he is entitled to recover the money he paid down.

Berston v. Gilbert, 180 Mich. 638. Plaintiff sold to the defendant upon a land contract a certain lot in the City of Flint for \$550, payable \$3 cash and \$1 per week.

Plaintiff is bringing a bill to cancel the contract because defendant is in arrears in his payments. Although the contract bore a secular date, it was as a matter of fact executed upon Sunday and all the payments that defendant made with one exception were made on Sundays. Defendant had gone into possession and erected buildings upon the premises. Plaintiff argues that by going into possession and also by making one payment on a week day the defendant has as a matter of fact created a new contract.

Held: Since the contract was executed on Sunday it was void under the statute and cannot be ratified upon a secular day. No new contract was created by any of the acts of the defendant. Whatever was done by the defendant was done in reliance upon the contract upon which the plaintiff bases this action and not upon any new contract. Since this was the case and this contract was void, the complainant's bill for cancellation which is based upon the contract must fail.

Nichols v. Burcham, 177 Mich. 601. The land involved in this case was owned by John and Albert Burcham, brothers, who were co-partners dealing in lands. On May 8th, 1909, the defendants Burcham entered into an option contract with the complainant whereby plaintiff had an option to purchase the land. Plaintiff paid the \$10 as required by the option contract and later, within the time of the option, bought the land on a land contract for \$1000, \$250 being paid down at the time of executing the agreement. Burchams are the nominal defendants, the real party defendant being one Mott Hicks.

On May 4th, 1909, or four days before the Burchams gave complainant the option, they entered into the following written agreement with defendant Hicks upon which the latter bases his claim to the land and by means of which he seeks to defeat complainant's bill praying that the Burchams be made to specifically perform their contract to convey to the plaintiff:

"Long Lake, Iosco County, Michigan, May 4, 1909. Description of land purchased by John Burcham and Albert Burcham by Mott Hicks: Beginning thirty two (32) rods north of the southeast corner of section five (5), thence west to the Little Long Lake, then west along said lake and west side of town four (4), then north to the D. & M. Ry., then to lot three (3), then east to two hundred and fifty feet (250), then north to Big Long Lake, then east down Big Long Lake to section line of section four (4), then south to the point of beginning, all lands being situated in lot thirty eight (38) of section five (5), town twenty three (23) north of range five (5), east, containing eighty three acres of land more or less. Received ten dollars (\$10) to apply on purchase price of said land, purchase price being nine hundred dollars (\$900). (Signed) John Burcham."

Held: The above receipt is not sufficient to satisfy the statute of frauds and is not a contract, within the meaning of the statute, to convey lands. It is deficient in that no time is specified as to when the payment of the purchase price shall be made. The defendant Hicks cannot therefore set up this agreement as a prior sale of the premises to him.

Ebert v. Cullen, 165 Mich. 75. In this case the plaintiff filed a bill to enforce specific performance of an agreement to sell certain lands. The agreement upon which the bill is predicated is as follows:

"Detroit, Mich., March 14, 1910. Received of E. L. Ebert, twenty five dollars on sale to him or principal of the 20 feet N. E. cor. Trowbridge and John R., price five hundred dollars. (Signed) Jas. H. Cullen."

Defendant argued that this alleged contract to sell, is not sufficient, under the statutes of the state to bind defendant to make the sale.

The court held that this receipt was insufficient to satisfy the requirements of the statute of frauds. For although the purchase price is specified, the time or times of payment is not expressed. A memorandum to be sufficient under the statute must be complete in itself and leave nothing to parol.

Taylor v. R. D. Scott & Co., 149 Mich. 525. In this case the plaintiff sued in assumpsit to recover damages for a breach of an alleged contract entered into between the plaintiff and the trustees of the R. D. Scott Estate. R. D. Scott, who was the principal stockholder in the R. D. Scott & Co. Corporation, died testate, naming in his will, W. R. Scott, F. L. Ward, F. G. Jacobs, E. S. Todd as trustees of his stock in the said corporation. After the said R. D. Scott's death the board of directors of the said corporation was reorganized, and some but not all of the directors were also trustees of the R. D. Scott Estate, holding the stock in trust. On the 19th of March, 1906, the plaintiff made the following proposition in writing upon

which he bases his present action: "Pontiac, Mich., 1906. R. D. Scott & Company, E. S. Todd, W. R. Scott, F. E. Ward, F. G. Jacobs, Trustees of the R. D. Scott Estate.

"Gentlemen: I hereby submit to you for your consideration and acceptance the following proposition to purchase the plant, merchandise, and business of the R. D. Scott Company.

"I will purchase the real estate known as the R. D. Scott & Company's factory, situated on the D., G. H. & M. R. R. tracks in the west portion of the City of Pontiac; also the building used in connection as a warehouse, situated on the ground along the D., G. H. & M. R. R. together with all machinery, office fixtures, tools and equipment, and will pay you therefor the sum of \$10,000 (ten thousand dollars).

"The real estate referred to above is described as all that part of Out Lot 21 on the northeast quarter of section 32, lying west of Baum and Terbusch's lands, and east by the D., G. H. & M. R. R. right of way. Also Lot No. 7, subdivision of Out Lots 22 and 23, and part of 13, and the southeast quarter of section 29.

"I will also purchase all the material which you may have on hand on the first day of April, 1906, contained in the above mentioned factory and used in the manufacture of your present line of work, and pay you for the same eighty per cent. of the market price of said material.

"Any other material not used in the manufacture of the present line as shown in your present catalogue, you are to remove from the factory by May 1, 1906.

"Any complete jobs which are completed and ready for shipment April 1, 1906, are not to be considered as part of this material, but are to be shipped and billed by you as your property. I will, however, allow you to store them in the factory without expense until you are able to ship the same.

"I am enclosing you my individual check for \$5000 (five thousand dollars) to apply on the purchase price when the property is properly deeded and transferred to me. It is my understanding that it will be necessary to have the sale, if made, approved by the probate court. (Signed) C. V. Taylor."

Below and to the left of the agreement are the words "accepted" and under it the names of the four trustees. The trustees filed a bill in chancery and obtained permission from the court to consent to the sale of the property embraced in the written proposition signed by the plaintiff, by the corporation. Shortly after and while negotiations were still proceeding, and before the board of directors had taken any action, the property was destroyed by fire. The defendant trustees then tendered back the plaintiff's check but he claims that there was a completed contract and brings this action for damages.

The court held that there was no valid contract in writing, binding upon the defendant corporation and answering the requirements of the statute of frauds. The proposition itself was addressed to the defendant corporation and also to the four trustees. The only acceptance in writing was a purported acceptance by the trustees.

There is nothing in the acceptance of these trustees to indicate that by their acceptance they were assuming to act as directors of the defendant company. This is a case where no corporate action was formally taken and where there is no written contract purporting to be made on behalf of the corporation; nor is there assent in writing of all the interested parties. Either corporate action, formally taken, or the assent of all the parties in interest is essential to make a valid contract for the sale and disposition of real estate.

Kroll v. Diamond Match Co., 113 Mich. 196. In this case the manager of the defendant company negotiated with the plaintiff for the purchase by the defendant of the plaintiff's interest in certain lands.

The following writing was executed by the manager of the defendant company and delivered to the plaintiff:

"Feby. 28, '94. Draft for \$2,000. We will send Wm. Kroll, of Kenton, Mich., on receipt from him of a Q. C. deed based on State T. D. of N. E. 1/4 23-47-40. D. M. Co., by J. H. Comstock, Mgr."

Plaintiff tendered a deed which defendant refused to accept, whereupon plaintiff brought this action for the price of the land. The defense relied on the statute of frauds. The defendant claimed that the execution of the deed in writing amounted to an acceptance of the above quoted offer of the defendant.

The court held that there was no proper acceptance of this offer in writing such as to satisfy the requirements of the statute of

frauds. The memorandum here was a mere preliminary negotiation and since not accepted at that time by the plaintiff in writing, a subsequent acceptance on the part of the plaintiff could not bind the defendant; for the original agreement being void, the defendants in order to be bound would have to execute a new agreement.

Shipman v. Campbell, 89 Mich. 82. Plaintiff brought suit against the defendant Campbell for moneys he had paid the defendants on the purchase price of certain real estate. *Waterman's Real Estate Exchange* carried on the negotiations with the plaintiff for the defendants. The plaintiff agreed to purchase the property for \$20,500 and the following alleged contract was executed by the defendant:

"Detroit, Mich., March 17, 1888. Received of *Waterman's Real Estate Exchange*, one hundred dollars, as earnest on purchase of my residence on northeast corner of Second and Bagg streets, lot 75 by 190 ft., for the sum of twenty thousand five hundred dollars (\$20,500) cash. Possession given May 15, 1888. \$100. *James T. Campbell*."

Soon after this the plaintiff gave the defendants two notes for \$500 each. Later, and before the deal had gone any farther, the plaintiff discovered that there was a prior levy on the premises made under an execution against the defendant. The defendant tendered a deed and the plaintiff refused to accept it because of the levy. Thereafter the defendant secured the discharge of the levy and tendered a deed to the plaintiff but the latter refused to accept it and now brings this action against the de-

fendant and his wife to recover the \$1100 he had paid on the purchase price.

The court held that the plaintiff could not recover in this action because he had sued the wife and that if he had discontinued his suit against the wife the decision would have been different. That the defendant's contention in regards to this preliminary agreement that it constituted a binding contract on the plaintiff could not be sustained. That this contract of purchase was not one which the defendants could enforce. It did not name any party to whom the conveyance was to be made as grantee, nor did it fix the time when the payments were to be made. Therefore this agreement or receipt is not sufficient to satisfy the requirements of the statute of frauds.

Webster v. Brown, 67 Mich. 328. The plaintiff filed a bill for the specific performance of the following alleged contract to convey land:

"Received of *Albert Chick*, seventy five dollars, as part payment on a certain piece of land described as follows: West half of south-east quarter of section eight, town nine north, of range thirteen east, being in *Sanlac County* and *State of Michigan*.

"The undersigned agrees to make and deliver to the said *Albert Chick* a bond for a warranty deed on or before the first day of January, 1870. Said bond is to express the several payments that is to be made, and the amount remaining to be paid. *Rob't G. Brown*. Dated this fourth day of May, A. D. 1869."

The plaintiff holds the above agreement as assignee of *Chick*

and claims that this agreement is sufficient to satisfy the requirements of the statute of frauds. The court held that this agreement is not one which can be specifically enforced as it does not satisfy the statute of frauds. At most it is but an agreement to make a land contract; this is not a contract itself. This agreement did not specify the purchase price, and failed to express the time or times of payment.

Wardell v. Williams, 62 Mich. 50. Plaintiff brought suit to recover damages for the breach of an alleged contract which provided for the conveyance of certain real estate from the defendant to the plaintiff.

The agreement upon which this action is based is as follows:

"Detroit, September 6, 1884. Orrin Wardell, Esq.—Dear Sir:—I will sell you my farm, containing 116 acres more or less, situate on Woodward Avenue, about half mile north of first toll gate, for the sum of \$39,000, viz., \$12,000 to be paid in cash, and the balance \$27,000 to be secured by a mortgage on said farm, payable on or before four years from the date of said mortgage, with interest at the rate of seven per cent. per annum, to be paid semi-annually; you to have the privilege of paying on account of said principal sum, the sum of one thousand dollars or more at any time during said term of four years.

"Said farm having been subdivided into lots, we will agree to the valuation of each lot, and, on payment being made on account of said mortgage, I agree to release lots of equal value to amount paid, the valuation of each lot as agreed

between us to be placed on plat. This offer to remain open for 20 days from date. (Signed) John C. Williams."

Within the twenty-day period the plaintiff told the defendant that he would accept the offer but he did not pay or tender the \$12,000 and he asserts that the defendant stated to him verbally that he would extend the time for payment beyond the twenty days. The question to be determined here was whether there was a valid contract between the parties. The defense was based upon the statute of frauds; the statute providing that contracts for the sale of lands must be in writing and signed by the party by whom the sale is to be made.

The defendant argued that this was not a completed contract.

The court held that this memorandum showed on its face that the minds of the parties had not met and that it was not evidence of a completed agreement, but merely stated terms which if accepted would be the basis of further negotiations between the parties. The valuation of the lots was still to be agreed upon. Where the contract is not complete in itself it is not sufficient to satisfy the requirements of the statute. Furthermore, in this particular case the plaintiff is not entitled to relief because he has not tendered the \$12,000 within the twenty-day period and the time for performance of this condition could not be extended by parol.

Gault v. Stormont, 51 Mich. 636. The plaintiff was the owner of certain property which he agreed to sell to the defendant for one thousand and fifty dollars; defendant

§ 19. Effect of Void Agreements Under Statute of Frauds.

—A contract for the sale of land which is not in writing and therefore does not comply with the statute of frauds is absolutely void and cannot be used for a basis for measuring damages or for any other purpose.⁵⁴ In harmony with this principle the courts have held that expenses incurred in carry-

paid seventy-five dollars down and the plaintiff gave him the following receipt:

"Wyandotte, April 26, 1881. Received from George Stormont the sum of seventy five dollars as part of the principal of ten hundred and fifty dollars on sale of my house and two lots on corner of Superior and Second streets in this city. David Gault. Witness: C. W. Thomas."

The understanding was that plaintiff was to return home and have a deed executed by himself and his wife, on receipt of which the defendant would pay the balance of the purchase price. Defendant was also to be allowed to go into possession of the premises whenever the tenant then in possession would permit him to do so. The wife of the plaintiff refused to unite with him in the deed and upon his failure to obtain his wife's signature to the deed, the plaintiff through his agent tendered back to the defendant the \$75 which had been paid down. The defendant refused to accept this return. Meanwhile the defendant had obtained possession of the premises from the tenant and refused to vacate when the plaintiff failed to complete the agreement. The plaintiff brought this action to recover possession of the premises.

The court held that there was no written evidence of the sale of the

lots except the receipt for the seventy-five dollars, and that was clearly insufficient to answer the requirements of the statute of frauds; for though it specified the purchase price, it failed to express the time or times of payment. A memorandum to be sufficient under the statute must be complete in itself and leave nothing to rest in parol.

Maynard v. Brown, 41 Mich. 298. Plaintiff filed a bill to compel the defendant to pay the amount which they had agreed upon as the purchase price of certain lands owned by the plaintiff. The written memorandum relating to the agreement was not signed by the plaintiff.

The court held that this contract was void under the statute of frauds because not signed by the party by whom the sale was to be made. A written agreement to convey real estate must be signed by the party by whom the sale is to be made, in order to comply with the requirements of the statute of frauds.

54. *Sutton v. Rowley*, holding that an unwritten agreement to pay for work by giving a conveyance of land is void under the statute of frauds and cannot be considered as measuring damages or for any other purpose. See also, *Abel v. Munson*, 18 Mich. 306.

ing out a void verbal agreement cannot be recovered,⁵⁵ and a promise made in consideration of a void verbal agreement to convey land is therefore without legal consideration and cannot be enforced⁵⁶ where money has been paid, however, as part of the purchase price upon a verbal agreement for the purchase of land if possession has not been given and there has been no part performance, such purchase money may be recovered on theory that there is no consideration therefor, the contract of purchase being void,⁵⁷ and this same principle applies even though the agreement that the money advanced should be forfeited in case of failure to purchase as such a forfeiture clause is but a part of the same contract and since the entire contract was void it created no obligation.⁵⁸ Not

55. *Taylor v. Boardman*, 24 Mich. 387, holding that a verbal contract promising to purchase land is void.

56. *Rhea v. Myers Est.*, 111 Mich. 140.

57. *Scott v. Bush*, 26 Mich. 418, holding that money paid under a verbal agreement to purchase land may be recovered back for the reason that the agreement is void under the statutes. *Scott v. Bush*, 29 Mich. 523, holding that money advanced under a verbal agreement to purchase land may be recovered back notwithstanding that it was part of the agreement that money advanced should be forfeited in case of failure to purchase.

58. *Doane v. Feathers Est.*, 119 Mich. 691. Generally on the subject of void contracts. See *Nime v. Sherman*, 43 Mich. 45, affirming and following the rule of *Scott v. Bush*, supra, *Gault v. Stormont*, 51 Mich. 636, holding that a memorandum of a sale of land contained in a receipt for part of the purchase price is void unless complete in itself and leaves nothing to be proved by parol evidence.

See also *Raub v. Smith*, 61 Mich. 543, holding that a contract for the formation of a partnership for the purchase of land for his business is void and cannot be used for any purpose.

See also, *Wardell v. Williams*, 62 Mich. 50, holding that a written offer to sell land framed in such terms as to make further negotiations between the parties necessary was not sufficiently complete in itself as to enable the purchaser to consummate the contract by accepting the offer.

See also *Brosman v. McGee*, 63 Mich. 454, holding that an oral agreement whereby the plaintiff was to purchase certain lands on joint account of himself and defendant was of no effect for any purpose.

See also, *Ball v. Harpham*, 140 Mich. 661, holding that a verbal executory agreement to purchase land subject to the back taxes thereon is void under the statute of frauds.

See also *Ebert v. Cullen*, 165 Mich. 75, holding that a memorandum of a sale of land showing

only is a verbal contract for the sale or purchase of land void, but a verbal agreement by one to purchase an interest in land for another is also void,⁵⁹ while the statement has been repeatedly made in various cases that a verbal contract for the sale of real estate is void for all purposes, nevertheless there is a line of cases holding that where a verbal agreement has been made to convey land in consideration of personal services such contract may be considered as estimating the value of services in an action to recover therefor, although there has been no acts of part performance by the promisor.⁶⁰

§ 20. Effect of Part Performance of Oral Agreement to Sell Real Estate—General Considerations.—Where verbal contracts for the sale of real estate have been partly performed, courts of equity have in the interests of substantial justice relaxed the rigid rule of law requiring contracts relating to real estate to be in writing, and have enforced such contracts in a large number of cases where the failure to do so would work an injustice. From the many decisions⁶¹ in relation to partly

a receipt of part of the purchase price and a description of the land but not stating the time or times of payment of the sum remaining due is insufficient compliance of the statute of frauds to support a bill for specific performance.

See also *Hillsberg v. Greer*, 172 Mich. 505, holding a contract insufficient where neither the time of payment nor rate of interest was specified.

See also *Harris v. Brown*, 172 Mich. 164.

59. When a promise is made to compensate for services by will and the promisor dies without so providing the value of the services may be recovered as a claim against the estate. In re. *Williams Est.*, 106 Mich. 490.

Faxton v. Faxon, 28 Mich. 159; *Sword v. Keith*, 31 Mich. 247; *Carmichael v. Carmichael*, 72 Mich. 85;

Fenton v. Emblers, 3 Burrow 1278; *Jacobson v. LeGrange's Ex'rs*, 3 Johns 199; *Patterson v. Patterson*, 13 Johns 379, *Martin v. Wrights Adm'rs*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill 576; *Bayliss v. Pricature's Estate*, 24 Wis. 651; *Jilson v. Gilbert*, 26 Wis. 637; *Little v. Dawson*, 4 Dall. 111; *Snyder v. Castor*, 4 Yeates, 353.

60. See also, *Rhea v. Myers Est.*, 111 Mich. 140, holding that a verbal agreement to convey land in consideration of personal services may be considered in estimating the value of the service in an action to recover therefor, although there has been no acts of part performance by the promisor.

61. See *Pomeroy's Equitable Remedies*, Vol 5, Sec. 2246, Fourth Edition. *Gates on Real Property*, Sec. 598, Fourth L. R. A. N. S., 957.

performed verbal contracts for the sale of land, the following general rules are deductible:

1. Proof of the contract and its terms must be clear, definite and conclusive.⁶²

2. Such a part performance of the contract that failure to enforce it would be a fraud on the other party to the contract of such a character that it could not be fully compensated by a recovery of damages in a court of law, either through the inherent difficulty of estimating the damage or the responsibility of the party against whom the damage might be sought.⁶³

3. The principle of equitable estoppel is sometimes invoked by the court in order to enforce an oral agreement and prevent a party from taking advantage of his own fraud.⁶⁴

4. The rule permitting courts of equity to decree specific performance of agreements in cases of part performance, which

Relief Refused Because of Uncertainty of the Contract

62. Specific performance even of a binding contract is not a matter of right and a court of equity will refuse it and turn the complainant over to his remedy at law, if not clearly satisfied that it embodies a real understanding of the parties. *Chambers v. Livermore*, 15 Mich. 381-388; *Smith v. Lawrence*, 15 Mich. 499; *Rust v. Conrad*, 47 Mich. 499-454; *Blanchard v. Railroad Company*, 31 Mich. 43; *Fowler v. DeLance*, 146 Mich. 630.

Where the terms of the contract are uncertain specific performance will not be decreed. 26 Am. and Eng. Enc. Law, 2nd Edition, page 59 and cases cited.

Kelsey v. McDonald, 76 Mich. 188. Holding that the object of the statute of frauds was designed to prevent dispute as to what the oral contract sought to be enforced was and if incomplete or indefinite, specific performance would be de-

nied. This case also holds that the mere naked possession by the complainant would not be sufficient if there was nothing done on the land that could not be compensated in an action for damages. *Lamb v. Hinman*, 46 Mich. 116; *Scott v. Bush*, 26 Mich. 418; *Colgrove v. Solomon*, 34 Mich. 494; *Nims v. Sherman*, 43 Mich. 50-1; *Davis v. Strobbridge*, 44 Mich. 159; *Demors v. Robinson*, 46 Mich. 62; *Scott v. Bush*, 29 Mich. 523; *Dwight v. Cutler*, 3 Mich. 573; *Bomier v. Caldwell*, 8 Id. 463; *Hogsett v. Ellis*, 17 Id. 3645; *Abell v. Munson*, 18 Id. 418; *Scott v. Bush*, 26 Id. 418; *DeMoss v. Robinson*, 46 Id. 62; *Wetmore v. Neuberger*, 44 Id. 362; *Gates*, on real property, Sec. 598.

63. *Pearson v. Gardner*, 202 Mich. 360; *Fowler v. Isabel*, 202 Mich. 572; *Pendergast v. Pendergast*, 206 Mich. 525.

64. *Lyle v. Munson*, 213 Mich. 250.

do not comply with the statute of frauds, has received express recognition by statute which provides that nothing therein contained (referring to the statute of frauds), should be construed to abridge the power of the courts of chancery to compel specific performance of agreements in cases of part performance of such agreements.⁶⁵

While part performance is essential in this class of cases in order to entitle the purchaser to equitable relief, nevertheless, part performance is not in all cases the essential test. In cases involving fraud, the defendant may be debarred from invoking the statute of frauds upon the doctrine of estoppel. Said the Supreme court in one case: "Part performance, while an essential in the test, does not in itself comprehend the whole doctrine of equitable relief in this class of cases. Misleading fraudulent conduct by act or acquiescence, is the underlying thought which moves the Chancery court under the principle of equitable estoppel to deny resort to the statute of frauds as an instrument of fraud." The question is not alone one of part performance, but part performance with the attending circumstances, making a case of fraud against which a court of equity ought to relieve. Thus, where a contract was executed on Sunday and the purchaser had taken possession and the defendant attempted to claim that the contract was void by reason of having been executed on Sunday, the court refused to allow such defense to prevail and enforced the oral agreement.⁶⁶

While the foregoing general principles are correct statements of the law, there has been a number of late cases where the courts have enforced the foregoing rules with much liberality and have granted specific performance of oral agreements wherein not much has been done by way of part performance. (See note 67.)

In the accompanying note we have set out those cases in one group,⁶⁷ where the courts have held part performance suf-

65. Compiled Laws of 1915, Section 11979.

66. *Lyle v. Munson*, 213 Mich. 250.

Verbal Contracts Partly Performed
—Illustrative Cases—Relief
Granted

67. *Lyle v. Munson*, *supra*. Where the defendant under a lease with the option to buy took possession

of property, took steps to construct a barn and hog pen; obtained and had upon the place sufficient material ready for their construction, consisting of lumber, scantling and timbers, and had posts set in the ground preparatory to building a hog pen, and the written contract was held to be void because executed on Sunday, the court enforced the oral agreement upon which the written agreement had been based and refused to allow the defendant to invoke the statute of frauds on the grounds of equitable estoppel.

Nickerson v. Nickerson, 209 Mich. 134. Where a father agreed with his son that he would convey at some future time a certain farm, upon the condition that the latter move upon the same, clear it, work it and make a home upon it, and said contract was fully performed by said son; was held not too indefinite and uncertain to admit of equitable relief, and specific performance was granted.

Loesy v. Hutchinson, 209 Mich. 318. Where parties entered into an oral lease in which it was agreed to make a written lease for three years and in pursuance of such agreement, plaintiff went into possession of said premises, paid the stipulated rent in advance and on defendant's refusal to make certain agreed repairs, made them themselves at a cost of approximately \$200.00. Held sufficient part performance to take an agreement out of the operation of the statute of frauds and to entitle plaintiff to a decree.

Engel v. Engel, 209 Mich. 276. Where certain heirs entered into an oral agreement, one of them to

have a farm belonging to the father's estate and the defendant, his brother, was to have the personal property. Where parties so contracting, each took possession of the property described in such agreement and remained in such possession which was acquiesced in by both parties for a period of two years, the courts held that to be such part performance as to take the case out of the statute and grant a specific performance.

Pendergast v. Pendergast, 206 Mich. 525. Where a certain son agreed with the father and entered into an oral contract when the father was eighty years of age, that in consideration of said son's remaining on the farm, keeping the home intact, and furnishing him with such care as he needed during the rest of his life, that he would deed said farm to him. This contract was fully performed on the part of the son. Held that specific performance of such oral agreement be decreed.

Pearson v. Gardner, 202 Mich. 360. In proceedings for the specific performance of a contract for the sale of land, where the vendees paid part of the purchase price, entered into possession, and exercised acts of ownership changing the character of the freehold, although the contract itself was insufficient to satisfy the statute of frauds, a court of equity will award a decree for specific performance.

Fowler v. Isbell, 202 Mich. 572. On a bill by a daughter against her father for the specific performance of an oral contract to convey to plaintiff a house and lot, where the record shows that plaintiff has performed on her part, under

authority of section 11979, 3 Comp. Laws 1915, the decree of the court below awarding specific performance will be affirmed.

Stuart v. Mattern, 141 Mich. 686. Payment of one thousand dollars on a purchase price of \$2,500.00, taking possession and expending \$2,000.00 as improvements, constitutes such a part performance of a contract to convey land made by a tenant in common as makes it inequitable to permit the other tenant who had full knowledge of the facts to repudiate the contract. In this case it was also held that a written contract to convey land naming the purchaser made by an agent duly authorized in writing and signed by him in behalf of his principal is valid even though the name of the purchaser was not disclosed to the vendor before the contract was made.

Stonehouse v. Stonehouse, 156 Mich. 43. Where a son desired to engage in business for himself and his father persuaded him to remain at home agreeing that if he would do so he would compensate him therefor, that such son did so remain and thereafter the father verbally agreed with him to make him a deed for certain lands and where it appeared that the son had expended large sums of money in improvements, the court held that he was the owner of the equitable title and was entitled to the specific performance.

Pike v. Pike, 121 Mich. 170. A parol agreement by parents to deed their farm to their son if he would surrender his lease to his farm on which he was living and come to live with them is taken out of the statute of frauds by his accepting

the offer, surrendering his lease and moving onto the farm with the parents and a bill for specific performance will lie.

Lamb v. Hinman, 46 Mich. 112. A son agreed with his father to remove with his family to the latter's house, take care of the father and turn over to him annually a certain proportion of the crops, in consideration of all of which the father was to deed to the son a certain parcel of land, which he promised to do, but did not. The only uncertainty related to the time at which the deed was to be given. Held, that the case was sufficient to sustain a bill for specific performance against the administrator and heirs at law of the father.

The reason why taking possession of land under an oral contract is such part performance of the contract as will sustain a bill for its specific performance, when payment of the purchase price is not, is that in the former case there is no certain basis for estimating damages for the breach.

Cilley v. Burkholder, 41 Mich. 749. Where a survey of the land and keeping possession for several years was held to be a sufficient part performance to entitle the vendee to specific performance.

Davis v. Strobridge, 44 Mich. 157. Where the vendee took possession of the property and paid a portion of the purchase price and did a small amount of clearing, this was held to be a sufficient part performance to entitle him to specific performance.

Delevan v. Wright, 110 Mich. 143. In this case a verbal agreement by grantee to pay an encumbrance on land to date and to provide a home

ficient and in another group have collected the cases where part performance has been held insufficient.⁶⁸

for the grantor was held to have been taken out of the statute of frauds by part performance.

Smellings v. Sally, 103 Mich. 580. In this case a tenant cleared certain lands under a verbal agreement that he should have the right to occupy the same for two years, specific performance was decreed against the landlord and the tenant was given the occupancy of the land for that period.

Karmichael v. Karmichael, 72 Mich. 76. In this case a mother had agreed to leave property to certain of her children by will and afterwards received all the benefits of her agreement. She was compelled to transfer the property in accordance with her contract.

Sigler v. Sigler, 108 Mich. 591. In this case a husband and wife under a verbal agreement divided their personal property upon the condition that the husband should have the right to occupy a certain portion of the premises, and should have the use of a certain vineyard. Specific performance was decreed.

Partially Performed Verbal Contracts—Relief Denied

68. *Buhler v. Trombley*, 139 Mich. 557. Mere occupancy of the dwelling and the making of ordinary repairs and changes to suit the premises to the needs of the occupant paid for out of partnership funds belonging to the promisor and promisee are not sufficient part performance to take parol promise to convey out of the statute of frauds. It is well settled that payment of the whole or part of the purchase

price is not sufficient to take the case out of the operation of the statute of frauds.

The courts have adopted various lines of reasoning to support this doctrine, some holding that payment of money should not be sufficient to support an action for specific performance, as it may readily be repaid, then the parties will be just where they were before, and have considered the legal remedy of the vendee sufficient to deny him the equitable jurisdiction. (See *Pomeroy's Equitable Remedies*, Vol. 5, Sec. 2246, 4th Edition; *Gates on Real Property*, Sec. 598; 4 L. R. A., N. S. 957.)

Klett v. Klett, 175 Mich. 224. Where a complainant sued to specifically enforce an oral contract to convey real and personal property to him in consideration of support and services to be rendered to the father and mother of complainant, he was not entitled to the relief prayed for where the contract provided that if the son became dissatisfied or the parties were unable to live peaceably together, he was not bound to continue to perform the contract. It was held in this case that the rights growing out of the oral contract made by the husband could not affect the homestead interest of the wife.

Fleming v. Fleming, 202 Mich. 615. An oral contract by husband and wife agreeing to give a son one-half of their farm, which was also their homestead in consideration of his moving upon the farm, working it and caring for them until their death, was void, not being

§ 21. Actions at Law on Verbal Contracts Partly Performed.

—No action at law can be maintained on a verbal contract partly performed, as the doctrine of part performance is purely a creation of equity and is not recognized at law. It therefore

in writing and signed by the wife as required by Sec. 2, Article 14, Const. But where the son had for eleven years performed his part of the contract, the court decreed the margin above the homestead exemption to be subject to a lien for the value of his services, together with any money or property he may have furnished, less the amount he may have received.

Harrison v. Eassom, 208 Mich. 685. Specific performance of a contract, whether written or oral, is not a matter of strict legal right, but rests in the sound discretion of the court. Where possession is taken under an oral contract in order to become an element of part performance, such possession must be exclusive and notorious under a claim of ownership. Where plaintiff went into possession of land as defendant's tenant and continued in unbroken possession from the time of entry, merely continuing their possession under a different claim of right than the tenancy under which they were let in, could not in itself constitute an act of part performance of the oral contract conveyed. Relief in this case denied.

Kelsey v. McDonald, 76 Mich. 188. Where plaintiff sued to recover \$5,000 which he had paid on an oral agreement for the purchase of certain lands, a verdict was directed in his favor. The defendant contended that the contract was taken out of the statute of frauds by such payment and the acceptance of a

deed for the land and by taking possession of the same, the court held that these acts were not sufficient part performance to entitle defendant to prevail as to the validity of the contract.

Kinyon v. Young, 44 Mich. 339. In this case it was held that to entitle a complainant to enforce a parol contract as against the owner of a legal title, you must show: 1st—A contract, the terms of which are clear and complete so that no reasonable doubt can exist respecting its enforcement according to the understanding of the parties, if enforcement seems equitable. 2nd—Such acts of part performance as according to equitable principles will justify this enforcement, notwithstanding the failure to comply with the statute of frauds in making it. 3rd—Payment of the purchase price.

Dragoo v. Dragoo, 50 Mich. 573. Specific performance cannot be granted on the basis of the parol contract unless there have been important acts of part performance raising strong equities in complainant's favor.

Peckham v. Walsh, 49 Mich. 181. Holding that it is not payment alone which will take the case out of the statute, but this with possession and acts done as owner in reliance thereon that cannot ordinarily be compensated in damages which entitle a party to the enforcement of the verbal agreement relating to the sale of lands.

follows that no distinctively legal action can be maintained upon an oral contract which is within the statute of frauds.⁶⁹ When a vendor disposes of property to a bona fide purchaser for value, without notice, the vendee may maintain a bill in equity to recover damages from the vendor.⁷⁰ The jurisdiction rests upon the ground that equity alone can grant relief.

§ 22. When Disposal of Land Contract in Escrow Advisable.

—Where the parties live in widely separated localities and have been brought together for the purpose of consummating a preliminary agreement, or when for any other reason, it appears that difficulty may be experienced in securing the signatures to the land contract after the execution of the preliminary agreement, it is sometimes advisable to have the land contract executed by all the parties and deposited in escrow with some bank or trust company pending the bringing down of the abstract or the making of the payment which entitles vendee to delivery of the land contract and possession of the property.

When the foregoing course is pursued and there is more than one vendor, care should be taken to specify how among the vendors such payments shall be divided.

If the land contract is delivered in escrow properly executed, such a course may avoid the necessity of executing any preliminary agreement at all, as the supreme court has held that the deposit of deeds in escrow is a sufficient compliance with the statute of frauds.⁷¹

69. Pomeroy's Equity Jur. 2283, sec. ed. *Phinizy v. Guernsey*, 111 Ga. 346, 349, 78 Am. St. Rep. 207, 36 S. E. 796; *Skinner & Sons v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85, etc., *Dry Dock Co.; Skinner & Sons v. Houghton*, 92 Md. 68, Am. St. Rep. 485, 48 Atl. 85, Am. St. Rep. 485, 48 Atl. 85; *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425.

70. Pomeroy's Equity Jur. Sec. 2284. *White v. Nutt*, 1 P. Wms. 61. *Coles v. Trecothick*, 9 Ves. 234, 246; *Kenney v. Wexham*, 6 Madd 355, 357; *Jackson v. Lever*, 3 Bro. C. C. 605.

71. *Supple v. Wheeler*, 210 Mich. 672; *Thatcher v. St. Andrews Church*, supra; *Stevens v. Castel*, 63 Mich. 117; *Roup v. Roup*, 136 Mich. 385; *Wisconsin, etc., R. Co. v. McKenna*, 139 Mich. 43; *Miller v. Beardslee*, 175 Mich. 414; *Loomis v. Loomis*, 178 Mich. 221.

§ 23. **Loss by Fire Pending Purchase.**—After a land contract has been concluded and possession thereunder given to the purchaser upon whom does the loss to the real estate from fire or accident fall? Unquestionably upon the vendee.⁷² But does the same rule apply when an executory contract for the sale of real estate has been duly concluded, but possession not given? By the weight of authority it is held that the loss in such cases falls on the vendee, upon the principle that as soon as a binding contract has been entered into for the purchase of the property, the vendee is then entitled to any increase or depreciation in the value of such property and should therefore be held to any loss which may occur.

Of course, the parties may, by stipulation, agree that the vendor shall assume this risk, but in the absence of stipulation the rule is as above stated.

Since equity throws the burden of loss by fire on the vendee it naturally follows that the insurance money should go to the vendee and so the courts everywhere in America hold while, the vendor is usually entitled to collect the insurance money, he is regarded by equity as a trustee for the vendee.⁷³

72. *Pomeroy's Equity Jur.* second edition, Sec. 2282.

Good v. Jarrard, 93 S. C. 43 L. R. A. (N. S.) 383; *Waite v. Stanley*, 88 Vt. 407 L. R. A. (N. S.), 1916 C.

Sewell v. Underhill, 197 N. Y. 168, 27 L. R. A. (N. S.) 233, 134 Am. Sr. Rep. 863, 18 Ann. Cases 795; *Fouts v. Foundray*, 31 Okl. 221, Ann. Cas. 1913 E, 301, 33 L. R. A. (N. S.) 251; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Phinizy v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 207, 36 S. E. 796; *Davidson v. Hawkeye Ins. Co.*, 71 Iowa 532, 60 Am. Rep. 818, 32 N. W. 514; *Goldman v. Rosenberg*, 116 N. Y. 78, 15 Am. St. Rep. 410, 22 N. E. 397 (Court here acknowledged general rule that loss should fall on vendee, but said it did not apply to the case by the terms of the con-

tract); *Skinner & Sons v. Houghton*, 92 Md. St. Rep. 485, 48 Atl. 85; *Copper v. Brown*, 76 N. J. Eq. 406, 139, Am. St. Rep. 770, 74 Atl. 987 (purchase at judicial sale); *Good v. Jarrard*, 93 S. C. 229, 43 L. R. A. (N. S.) 383, 76 S. E. 698. Where the state of the title is such at the time of the loss that specific performance could not then be enforced; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65 (Action at law by vendor); *Gould v. Murch*, 70 Me. 288, 289, 35 Am. Rep. 325; *Powell v. Dayton, etc., R. R.*, 12 Or. 488, 8 Pac. 544, 14 Or. 356, 12 Pac. 665, 16 Or. 33, 8 Am. St. Rep. 251, 16 Pac. 863.

73. *Marion v. Wolcott*, 68 New Jersey Eq. 20. Plaintiff contracted to sell a certain house and lot to the defendant. Before the purchase price was paid the house was de-

If by reason of the happening of some unforeseen contingency the estate entirely fails the loss nevertheless falls on the vendee, for instance where the vendee purchased a life estate and the life dropped or where the agreement was for the purchase of an annuity for the vendee's life, and the vendee dies before the first payment is due.⁷⁴

stroyed by fire and plaintiff brings this action to recover from the defendant, the vendee, the amount of the insurance which he had received for the loss.

The court held that under a contract for sale of lands purchaser becomes equitable owner and takes benefits and must also stand losses which accrue. This insurance was to protect defendant's interest and he is entitled to same.

Kimberlin v. Templeton, 55 Ind. App. 155, 102 N. E. 160. The court stated the general rule in contracts for the sale of real estate where loss occurs, to be as follows: In a contract for the sale of real estate the vendee becomes the equitable owner; the vendee secures all benefits and assumes all risks of ownership.

Manning v. North British Ins. Co., 123 Mo. App. 456—99 S. W. 1095. Plaintiff had entered into a contract to sell a third party certain real property; before property was paid for and before vendee went into possession the house thereon was destroyed by fire. The insurance policy contained the provision that change of ownership would avoid the policy. Question was whether there had been a change of ownership or not. The court held: A valid contract of sale of real estate puts equitable title in vendee even though he is not in possession. Any damage to property under such cir-

cumstances falls on vendee. Hence there was such a change of ownership as to avoid the policy.

Sewell v. Underhill, 197 N. Y. 168, 27 L. R. A. (N. S.) 233. The defendant contracted to sell certain real property to the plaintiff. Before completion of payment therefor, but after part payment had been made and plaintiff had entered into possession the house on the property was burned. Plaintiff now seeks to recover the value of the house.

Court held: Where property is destroyed by fire without fault of either party before final papers are completed, but after contract has been executed, the loss falls on the vendee.

74. *Fouts v. Foudray*, 31 Okl. 221—38 L. R. A. (N. S.) 251. Plaintiff sold defendant certain property. Deed placed in escrow to be delivered on payment of a promissory note executed by the defendant. The house was destroyed by fire and defendant refused to pay the note, claiming that the consideration had been destroyed. Held: Equitable title passed immediately on execution of contract to the vendee. Where buildings are destroyed by fire between date of contract of sale and execution of deed and delivery thereof the loss must be borne by the vendee.

Marks v. Tichenor, 85 Ky. 536—4 S. W. 225. Plaintiff sold certain

§ 24. **Sufficiency of Tender of Performance.**—It is not always necessary for the vendee to actually tender to the vendor the amount of the purchase price or of the initial payment to constitute a valid and sufficient tender of performance on his part. If the vendee appears at the appointed time and place ready and willing to pay, and the vendor fails to appear, a sufficient tender has been made by the vendee without any farther action on his part, and it is not necessary for him to prepare and tender a deed to be executed by the other party.⁷⁵

As a general rule a court of equity will not aid a vendee who has delayed in making payments required by a contract provided at the time he made such agreement he had no reasonable expectation for believing he would be able to comply with the terms of the contract.⁷⁶ Nevertheless a court is not ordinarily concerned where a tender is made whether the money for such tender was furnished by the plaintiffs themselves or advanced by one who expected to purchase from the vendee after they acquired title.⁷⁷

In the absence of such a provision in the contract time will not be held to be of essence thereof and the fact that the vendee's tender of performance may be made a few days after the date fixed in the contract will not necessarily terminate the contractual relations.⁷⁸

real estate to the defendant and latter executed a promissory note in payment therefor. Before delivery of deed the house was destroyed by fire. Defendant refused to pay the note. Held: On sale of land it becomes the property of the vendee from the execution, delivery and acceptance of the written contract; and if a building thereon is destroyed by fire between the time of such contract of sale and the time fixed for delivery of possession by vendor, the vendee and not the vendor bears the loss.

75. *Frazer v. Hovey*, 195 Mich. 169; *Daley v. Litchfield*, 10 Mich. 29, 36 Cyc. P. 706.

76. *Waller v. Lieberman*, 214 Mich. 445; *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214. Where specific performance was refused, it appearing among other things that the vendee had entered into the contract without any bona fide belief on his part that he could swing the deal unless something turned up or he might succeed in transferring his contract to other hands.

77. *Marussa v. Temerowski*, 204 Mich. 271; *Waller v. Lieberman*, 214 Mich. 445.

78. *Waller v. Lieberman*, *supra*; *Marussa v. Temerowski*, *supra*; *Lozon v. McKay*, 203 Mich. 364.

The decisions further hold that if the parties pursue such a course of conduct as to indicate that performance is not expected in accordance with the strict letter of the contract, such conduct may constitute a waiver of the right to require strict performance.⁷⁹

While at law where a time is fixed for the performance of a contract it is considered to be of the essence thereof, it is otherwise in a court of equity and its execution will be decreed notwithstanding the time has elapsed for its performance unless there has been culpable negligence or willful delay on the part of him who is seeking the aid of the court.⁸⁰

From the foregoing rule of law it would seem that much more care must be exercised respecting tender where the parties seeking redress expect to obtain such redress in a court of law rather than in a court of equity.

§ 25. Briefs Used in Late Michigan Cases Involving Statute of Frauds.

OGOOSHEVITZ v. SAMPSON, 211 Mich. 184—

- (a) Statement of Fact.
- (b) Brief for Plaintiff.
- (c) Brief for Defendant.

OGOOSHEVITZ v. SAMPSON, 211 Mich. 184—

(a) Statement of Fact.—The above parties entered into an agreement for the sale of land, the writing being as follows: "Detroit, Michigan, March 2nd, 1916. Received of I. Ogooshevitz, \$100,00 as first payment on lot known as westerly 18 feet of lot seven (7) and easterly thirty-four (34) feet of lot eight (8), being 52 feet on the south side of Palmer Avenue, West of Beaubien Street, for the sum of \$5,720.00, terms as follows: \$620.00 more on delivery of land contract or deed and remaining \$5,000.00 on or before one (1) year from the date of contract, purchaser to receive an abstract brought down to date before contract is made, to show free and clear title. Six per cent interest. Geo. L. Sampson."

Plaintiff alleged that he tendered the amount due and defendant refused to carry out the terms. Suit was started by the plaintiff for damages. Upon the trial of the case, the question arose whether the above writing was sufficient to satisfy the statute of frauds, and whether parol testimony was admissible to vary the terms of the above writing.

From a judgment for an insufficient amount for plaintiff, plaintiff appeals. Reversed.

(b) Brief for Plaintiff.—The agreement was a complete, full, and valid

79. Curry v. Curry, 213 Mich. 309, 39 Cyc. P. 1384; Waller v. Lieberman, supra, and cases there cited.
80. Waller v. Lieberman, supra, man, supra.

agreement between the parties. Refusal to carry out or perform its terms was a sufficient basis for an action of damages or a suit for specific performance. *Mull v. Smith*, 132 Mich. 618; *Smith v. Mathis*, 174 Mich. 262; *Miller v. Smith*, 140 Mich. 524; *Brin v. Michalski*, 188 Mich. 400; *Walsh v. Oakman*, 199 Mich. 688.

The trial court erred in allowing parol testimony to vary the terms of the above agreement in the absence of fraud or misrepresentation. *Smith v. Mathis*, 174 Mich. 262; *Wolf v. Meyantz*, 184 Mich. 452; *Ogooshevitz v. Arnold*, 197 Mich. 203; *Stange v. Wilson*, 17 Mich. 341; *Vanderkarr v. Thompson*, 19 Mich. 82; *Kerwin v. Baker*, 199 Mich. 688.

(c) Brief for Defendant.—The writing made by these parties was clearly memoranda, and indicated that the parties would get together at a later date and enter into a contract, and the trial court properly called attention to the statute of frauds applicable to this case.

"An instrument relating to the sale and conveyance of land, if sufficient to comply with the essential requisites of a deed, may, according to the intention of the parties, operate either as an absolute conveyance or as a mere bond for title or contract to convey."

39 Cyc. 1299, D. 1.

When the contract itself is in writing and signed by both parties, the writing is the contract. When the memorandum of the oral contract is in writing and signed by the vendor, it is not the contract but a memorandum, which makes it binding upon him if accepted by vendee. *Mull v. Smith*, 132 Mich. 168.

Parol testimony is admissible to bring out the circumstances and allow the court to view the circumstances as the parties viewed them, and so to judge of the meaning of the words and of the correct application of the language to the thing described. *Goddard v. Foster*, 17 Wall. (U. S.) 1421; *Brown v. McGran*, 14 Peters (U. S.) 493; *Jennings v. Sherwood*, 8 Conn. 127; *First Nat. Bank v. Dana*, 79 N. Y. 112.

COOPER v. PIERSON, 212 Mich. 659—

(a) Statement of Fact.

(b) Brief for Plaintiff.

(c) Brief for Defendant.

COOPER v. PIERSON, 212 Mich. 659—

(a) Statement of Fact.—Plaintiff received the following option from the defendants: "May 26th, 1919. In consideration of One (\$1.00) Dollars, we the undersigned, agree to give option to Morris Cooper, on Lots 831, 833 and 835, North Saginaw Street, for the sum of Two Hundred Sixty and no/100 Dollars per front foot. It is agreed that first payment be made five thousand dollars. Balance to be secured by deed of trust for five years with six per cent interest. This option will expire June 26, 1919.—Fred D. Pierson, Robert L. Pierson, Fannie G. Pierson."

On the last day of the option, plaintiff met the defendants and requested them to have the papers drawn. Upon failure to find defendant's attorney in, an extension of ten days was agreed to upon payment of \$100.00. The extension read as follows: "\$100.00. June 26, 1919.

Received from Morris Cooper, One Hundred and no/100 Dollars, part payment on purchase price of Lots No. —, known in option furnished to Morris Cooper in option dated May 26th, 1919, the revised number known as number 821 North Saginaw Street, Flint, Michigan, deed to be drawn on or before ten days. Fred D. Pierson."

The defendants refused to convey and plaintiff filed this bill for specific performance.

The court held that the option was insufficient to satisfy the statute of frauds because it did not designate the property intended to be conveyed, it not appearing in what state, county or village the property was situated, but reading the option and the ten-day extension together. the extension supplied what was lacking in the option, and the extension being signed by Fred Pierson only, the option is binding upon him only.

The court held that plaintiff was entitled to a decree against Fred Pierson only. Plaintiff and Fred Pierson appeal. Affirmed.

(b) Brief for Plaintiff.—The option was sufficient to satisfy the statute of frauds, as all parties knew what property was intended and the defendants testified that they owned only one parcel on North Saginaw Street.

The court has passed upon the question of description many times and have held the following sufficient: "My house and two lots on corner of Superior and Second Sts., this city." *Gault v. Starmont*, 51 Mich. 636. "Schoolcraft Store." *Francis v. Barry*, 69 Mich. 311. "My place." *Garvey v. Parkhurst*, 127 Mich. 368. "House and lots known as 706 Antoine St." *Ogooshevitz v. Arnold*, 197 Mich. 203. "House and lot situated Nos. 347 and 349 Alexandrine Avenue East, Detroit." *Brin v. Michalski*, 188 Mich. 400. "He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance." *McFerran v. Taylor*, 3 Cranch (U. S.) 270; 29 Am. & Eng. Ency. 810.

(c) Brief for Defendant.—Five things are necessary in order to make a valid memorandum under the statute—the parties, property, consideration, terms, and time of performance. *Ebert v. Culle*, 165 Mich. 75; *Lumber Co. v. Iron Co.*, 101 Mich. 577; *Gault v. Starmont*, 51 Mich. 636; *Rosenbaum v. Tyszka*, 192 Mich. 457; *Droppers v. Marshall*, 206 Mich. 560.

In *Droppers v. Marshall*, *supra*, the memorandum relied upon contained a correct description of the premises with the exception of the section number which was left out. The court held that on account of the omission of the section number, the memorandum was fatally defective.

CHAPTER III

FORMS OF PRELIMINARY CONTRACTS LAND CONTRACTS ASSIGNMENTS OF LAND CONTRACTS ESCROW AGREEMENTS POWERS OF ATTORNEY

- § 26. Short Form Preliminary Contract for the Sale of Real Estate for Cash.
- § 27 Preliminary Agreement Short Form.
- § 28. Preliminary Contract for the Sale of Real Estate—Form Favorable to Vendee.
- § 29. Form Favorable to the Vendor.
- § 30. Escrow Memorandum for the Disposition of a Land Contract in Escrow.
- § 31. Defective Forms of Land Contract.
- § 32. Form of Land Contracts—General.
- § 33. Wayne County Abstract Company's Form.
- § 34. Forms of Land Contract—Union Trust Company Form.
- § 35. Detroit Land Contract Form.
- § 36. Form of Land Contract with Special Tax Clause.
- § 37. Contract for Sale of Farm Land on Long Time.
- § 38. Form for Recording Payments on Land Contracts.
- § 39. Assignment of Land Contract, Long Form.
- § 40. Assignment of Land Contract, Short Form, with Consent of Vendor.
- § 41. Contract for the Sale of City Lots Vendor to Advance Funds for Building.
- § 42. Power of Attorney to Lease or Sell Land.

§ 26. Short Form Preliminary Contract for the Sale of Real Estate for Cash.—Where real estate is sold for cash, the contract, of course, is greatly simplified, and many subjects which in the preliminary contract for the execution of a land contract must be dealt with, may be omitted altogether.

The following is a simple form which contains the essential elements of the contract:

John Doe, hereinafter known as the vendor, in consideration of the price of \$....., a part payment on which in the sum of \$..... is by him, hereby acknowledged, does hereby agree

to sell and convey to Richard Roe, hereinafter known as purchaser, the following described real estate situated in the City of _____, County of _____, State of Michigan, to wit:
 (Here describe real estate.)

The vendor agrees to deliver abstract of title for examination to the purchaser within five days from date, and purchaser shall have ten days' additional time in which to examine said abstract and if same shall show a merchantable title, free and clear from all encumbrances, vendor shall prepare and execute a warranty deed containing release of dower rights for such real estate, and concurrently with the delivery of such deed, the balance of purchase price shall be paid. In the event title to such real estate shall be defective, the time for closing this transaction shall be extended a sufficient length of time to permit such title to be corrected, but in no case to exceed six months from date. In the event it shall be found impossible to correct defects, if any shall exist in said title, then vendor shall return to the purchaser the initial payment made hereon. If purchaser shall fail to pay the balance of such purchase price, and the same shall become due, the vendor shall have the right to retain the payment made herein as liquidated damages for breach of this agreement. Possession shall not be given to the purchaser until full purchase price shall have been made.

Dated this _____ day of _____
 _____, A. D. _____

_____ Vendor.
 _____ Purchaser.

§ 27. Preliminary Agreement, Short Form.—This contract made and entered into by and between John Doe and Mary Doe, his wife, hereinafter referred to as vendors and Richard Roe hereinafter referred to as purchaser, Witnesseth:

The vendors agree to sell and the purchaser agrees to purchase for the price of _____ Dollars upon the terms and conditions hereinafter set out, the following described real

estate, to-wit: (here describe the property by legal description if possible, although the street number together with the city and state will be sufficient).

Said purchase price shall be payable as follows: The sum of Dollars in cash, receipt of which is hereby acknowledged and the farther sum of Dollars (hereinafter insert the amount to be paid upon the execution of land contract) to be paid upon the due execution and delivery of the land contract for the sale of the above described premises, at which time the purchaser shall be given possession of said real estate; the balance of said purchase price shall be payable at the rate of Dollars per month including interest at the rate of 6% per annum, payable monthly.

Purchaser shall receive an abstract prepared by (here insert the name of the firm who will prepare the abstract) brought down to date showing a merchantable title, which abstract of title shall be delivered to the purchaser within days from date, and if the seller shall fail, neglect, or refuse to deliver such abstract on or before such date, the time for closing this transaction by the execution of said land contract, shall be postponed the period of such default. If such abstract of title, when presented, shall prove defective, the seller shall have a reasonable length of time to correct such defects, if any there be, considering the nature and character thereof. (If property is sold by an individual having a mortgage thereon, this fact should be specified.) [If vendors do not hold legal title, but themselves are buying on a land contract, this fact should be specified.]

Purchaser shall pay all taxes and special assessments which may accrue from and after the execution of said land contract, and said contract shall contain clauses providing that the purchaser shall keep such property insured in a responsible fire insurance company to be selected by sellers, in an amount to be approved by the sellers. Such insurance shall be kept up and in force until the purchase money is fully paid. Also that purchaser shall keep the buildings and other improvements on said premises in a good state of repair, and shall pay promptly all taxes and assessments that may, from time to time, accrue on said premises, and shall upon the execution

of said land contract, enter said property for taxation in their own names.

Further, that in the event the purchaser shall fail, neglect, or refuse to meet the payments herein provided for, and carry out the terms and conditions of said contract, then the seller shall, upon such failure, have the right to declare such contract void, and to retain whatever may have been paid hereon in the premises, together with the improvements thereon, as stipulated damages, and may consider and treat the purchaser as their tenants holding over without permission, and may, without notice, written or otherwise, take possession of the premises, and remove the purchaser.

All rentals shall be adjusted at time of execution of land contract.

In witness whereof, the parties have hereunto set their hands the day and year above written.

Both buyer and seller should sign this form of preliminary agreement.

§ 28. Preliminary Contract for the Sale of Real Estate—Form Favorable to Vendee.—If a form of contract is desired specially favorable to the vendee, such form can be secured by omitting from the form of contract set forth in the preceding section, the following clauses:

1. The clause requiring vendee, in case any action is brought for the enforcement of the contract, to pay the mortgage tax and a certain attorney fee.

2. The clause permitting vendor to declare the contract forfeited upon default in meeting any of the payments.

3. The provision permitting vendor to place an unlimited mortgage on the premises.

4. The provision permitting vendor to serve a notice of forfeiture by mail or by delivery to the premises.

5. The clauses prohibiting the assignment of the contract, and by adding the following additional provisions:

It is further agreed by and between the parties that all gas ranges together with the fixtures thereof now situated on said premises shall pass with the sale of said real estate.

If there is any other property about which some question might be raised as to whether or not it passed with the real estate, a provision should be inserted in such contract that such property shall be included in the sale.

While it is true that the law imposes upon the vendor the duty of delivering the premises in substantially the same condition as when the preliminary contract was executed, nevertheless it will avoid misunderstanding and possible litigation by incorporating such a provision in the contract. The following clause seems to meet the requirements:

"The party of the first part contracts and agrees to deliver said premises to the party of the second part in substantially the same condition as said premises are now in, and if any windows, lights, or fixtures belonging to said real estate shall be broken between the date of signing this preliminary agreement and date of the execution of the land contract and the surrender of possession of said premises, the party of the first part shall be liable for such breakage, and agrees to stand the expense of placing said premises in the same condition as they are now in."

§ 29. Form Favorable to the Vendor.—This is a form especially favorable to the vendor. It differs from the usual form of land contract in the following particulars:

(a) It contains a clause authorizing vendor to serve a notice of forfeiture by mail on the vendee or by delivering same to the premises.

(b) It compels the vendee to pay the specific mortgage tax and an attorney fee in the event of forfeiture of contract.

(c) It provides that in the event title should prove defective, vendor shall have a reasonable length of time to perfect title.

(d) It provides in the event vendee shall fail to make necessary repairs, vendor may effect such repairs and charge them against the contract.

(e) It provides that upon default in making payments vendor shall have the right to declare the entire balance due upon the contract.

(f) It provides that in the event the vendee shall assign the contract, reception of payment by the vendor from the assignee, shall not be deemed to be an implied consent of such an assignment. This contract is very harsh in its provisions towards the vendee and counsel for the vendee would be justified in refusing to accept such an agreement, except under very unusual conditions.

This contract made and entered into this (here insert date) by and between (here insert residence) hereinafter referred to as party of the first part and (here insert name of vendee) of (here insert residence of vendee) hereinafter referred to as party of the second part, Witnesseth:

The said party of the first part, in consideration of the sum of (here insert amount to be paid) to be duly paid, hereby agrees to sell unto the party of the second part all that certain piece or parcel of land lying and being situate in the (here insert where property is located) in the County of.....and State of Michigan, and more particularly known and described as (here described property) for the sum of (here insert consideration) dollars, which the said party of the second part agrees to pay to the party of the first part, as follows: dollars at the date hereof, and the remaining.....dollars representing the balance of the purchase price in the following manner, to wit: dollars on or before days from date, at which time the parties hereto agree to execute and deliver a land contract embodying the terms, conditions and stipulations herein set forth and concurrently possession of said property shall be given to party of the second part. The remainder of said purchase price shall be paid in monthly installments at the rate of dollars per month including interest at the rate of six per cent. on all sums which may from time to time remain unpaid on the balance of said purchase price, said interest to be computed monthly from the date of the execution of the said land contract. Said party of second part from and after the date of the execution of

said land contract and the taking possession by him of said real estate agrees to pay all taxes and assessments extraordinary as well as ordinary that shall be taxed or assessed on said premises from and after such date until said sum shall be fully paid as aforesaid.

It is further agreed that said land contract when executed shall contain the following clauses and provisions:

(a) Party of the second part further agrees to enter for taxation in his own name and pay within forty (40) days after the same shall become payable, all taxes, assessments, extraordinary, as well as ordinary, that may be levied thereon, including the taxes for the year 19...., also in case party of the first part is obliged to bring any action for the enforcement of this contract, party of the second part will pay the specific mortgage tax of \$5.00 per thousand dollars of the amount secured, and all costs of such action, including a reasonable attorney fee for serving notice of termination and representation of first party in court, not to exceed \$10.00. All such taxes, assessments, costs, and expenses shall, if not paid by second party upon demand, be added to the balance of the principal sum due hereunder and shall bear interest thereafter at per cent. per annum.

(b) Party of the second part will keep all buildings and improvements upon and to be placed upon said premises insured in a responsible insurance company which party of the first part shall have the option of selecting if he so desires, in an amount to be approved by first party for the benefit of first party, until the purchase money is fully paid; and the said party of the second part shall and will keep the buildings and all other improvements upon said premises in good repair. Should party of the second part fail to keep said buildings and improvements insured, or to make necessary repairs to prevent damage to the buildings, party of the first part may effect such insurance, and may cause said repairs to be made and the expense thereof shall be added to the principal sum due hereunder and bear interest at six per cent. per annum until paid.

(c) Party of the second part accepts this contract subject to all or any building restrictions shown in the chain of title, and agrees to conform to same, and when the premises are

finally conveyed to him, will accept a deed subject to such restrictions.

(d) Party of the first part shall have the right to place a mortgage upon said premises for any part of the unpaid balance, and party of the second part upon paying this contract down to said mortgage will accept a deed subject to said mortgage and will assume and pay same.

(e) Time shall be of the essence of this contract, and if second party shall fail to make any of the payments or perform any of the conditions above set forth, in the manner and at the time above limited therefor, party of the first part shall immediately after such failure have the right to declare this contract terminated, and may thereupon retain whatever may have been paid hereon, and the premises, together with all buildings and improvements, as stipulated damages for the breach of this contract, and rent for the use of said premises. In such event the premises shall be surrendered to first party and said first party shall have the right to enter and repossess same, and second party shall be deemed and treated as a tenant or tenants holding over without permission. Any notice of such termination may be given to second party by mailing same to his last known address, or by delivery to the premises. In addition to the foregoing remedy, but not in limitation thereof, first party shall, in case of default of second party, have the right to declare the entire balance due upon this contract and proceed to immediate collection thereof, either by suit at law or equity.

(f) Upon the execution of this contract, and so long as party of the second part shall not have defaulted thereunder, party of the second part shall have possession of said premises, and upon payment to first party of the sums chargeable hereon and the performance of all agreements herein, in the manner and at the times above limited, party of the first part upon surrender of this contract will execute and deliver to said party of the second part a good and sufficient warranty deed of said premises warranting same against all liens and encumbrances, except such as may have accrued on said land or buildings thereon subsequent to the date hereof, by or through the acts

of negligence of any party or parties other than party of the first part hereto and except any and all restrictions heretofore imposed upon or against the use of said premises, and will also furnish an abstract of title showing marketable title in first party or parties.

(g) Party of the second part shall not assign this contract without the consent of party of the first part being first endorsed in writing hereon, and no payments received by first party upon this contract after such assignment shall be deemed or considered an implied consent to such assignment.

It is further agreed that the party of the first part shall furnish the party of the second part within ten days from date, an abstract of title brought down to date, which abstract shall show a merchantable title in party of the first part.

It is further agreed that should the title to said real estate prove to be defective, the part of the first part shall have additional time in which to perfect said title, such additional time in no case to exceed six months.

If party of the first part himself holds the property under land contract, then state as follows: "Which abstract of title shall show a good marketable title in (here name vendors of the party of the first part).

It is further agreed that this contract shall convey no equity to party of the first part in said premises and in the event said party of the second part fails, neglects, or refuses to make said payment of dollars and to execute the said land contract as herein provided, then the party of the first part hereof may retain any sums paid hereunder as liquidated damages on the failure of said party of the second part to perform this contract in accordance with the terms and conditions thereof.

In witness hereof, the parties have hereunto set their hands this.....day of.....

.....

In the presence of

.....

§ 30. Escrow Memorandum for the Disposition of a Land Contract in Escrow.—

(Insert date and place.)

It is hereby agreed by and between the parties hereto that the attached land contract shall be placed in escrow with the Trust Company to be held by such Trust Company until the initial payment provided for therein of \$..... shall have been paid to such Trust Company, whereupon the said Trust Company shall at once deliver said contract to the vendors named therein, and shall remit said payment to the vendors respectively, share and share alike.

It is further agreed that if said sum of \$....., the initial payment above provided for, shall not have been paid on or before 15 days from date hereof (here insert date to correspond with situation of the parties) then this agreement shall be of no further force or effect and the vendors may retain all payments made hereunder as liquidated damages and said Trust Company is hereby authorized to deliver forthwith said land contract to the vendors hereof and time shall be deemed to be of the essence of this contract.

.....

 Vendors

.....

 Vendees.

Receipt and Certificate by Custodian.

The undersigned Trust Company of the State of, does hereby acknowledge receipt of the above referred land contract for the uses and purposes as above stated and agrees to hold and dispose of the same pursuant to the foregoing instructions.

In witness whereof the said Trust Company has hereunto set its hand and seal this day of A. D. 19....

.....
 By.....

§ 31. Defective Forms of Land Contract.—It is advisable from the standpoint of the vendee, to insert in the land contract a provision requiring a vendor to furnish an abstract of title to the real estate he seeks to sell, showing a marketable title in such vendor. Certain printed forms of land contracts widely used in the City of Detroit do not contain any provision of this character and should therefore be avoided, unless corrected by the insertion of such a provision.

§ 32. Form of Land Contracts—General.—This contract made and entered into this (here insert date) by and between (here insert name of vendor) of (here insert residence) hereinafter referred to as party of the first part and (here insert name of vendee) of (here insert residence of vendee) hereinafter referred to as party of the second part, Witnesseth,

The said party of the first part, in consideration of the sum of (here insert amount to be paid) to be duly paid, hereby agrees to sell unto the party of the second part all that certain piece or parcel of land lying and being situate in the (here insert where property is located) in the County of and State of Michigan and more particularly known and described as (here describe property) for the sum of (here insert considerations) dollars which the said party of the second part agrees to pay to the party of the first part as follows: dollars at the date hereof, and the remaining, (here designate how payments are to be made) with interest from on all sums at any time unpaid hereon at the rate of per cent. per annum till due, and thereafter at the rate of per cent. per annum till paid, payable herefrom.

Said party of the second part as part of the purchase price also agrees to pay all taxes and assessments, extraordinary as well as ordinary, that shall be taxed or assessed on said premises from the date hereof until said sum shall be fully paid as aforesaid, within twenty-five days after the same shall become payable. If default be made on the part of said party of the second part in making such payment of taxes or assessments, said party of the first part shall have the right to pay the same and have the payment due hereon from the time of

such payment with interest at per cent. per annum till paid.

Said party of the first part agrees that before or upon the completion of this contract he will furnish to said second party an abstract of title to the above described premises, which abstract of title shall show a good, marketable title in the said party of the first part, free from all liens and encumbrances, except such as may have accrued subsequent to the date hereof by or through the acts or negligence of said party of the second part or his assigns.

And it is also agreed, by and between the parties to these presents that the said party of the second part shall and will pay the expenses of keeping the buildings, erected and to be erected upon the lands above contracted for, insured against loss and damage by fire (the policies to be held by the party of the first part), with loss, if any, payable to vendor as his interest may appear, by insurers and in manner and amount approved by the said party of the first part, such expense to be chargeable herein if paid by the party of the first part, with interest thereon at the rate of per cent. per annum. And that the said party of the first part, on receiving the aforementioned payment in full, at the times and in the manner above mentioned, and all sums chargeable in his favor hereon, and upon the surrender of the duplicate of this contract, shall at his own proper cost and expense, execute and deliver to the said party of the second part, or to his assigns, a good and sufficient conveyance of said described lands free and clear from all liens and encumbrances, except such as may have accrued thereon subsequent to the date hereof by or through the acts or negligence of said party of the second part or his assigns.

It is mutually agreed between said parties that the said party of the second part shall have possession of said premises on and after this date while he shall not be in default on his part in carrying out the terms hereof, taking and holding such possession hereunder, and shall keep the same in as good condition as they are at the date hereof until the said sum shall be paid as aforesaid; and if said party of the second part shall fail to perform this contract, or any part, shall immediately after such failure, have a right to declare the same

void and retain whatever may have been paid hereon, and all improvements that may have been made on said premises, and may consider and treat the party of the second part as a tenant holding over without permission, and may take immediate possession of the premises and remove the party of the second part therefrom.

It is further agreed by and between the parties hereto that this contract or any right or interest therein or thereunder shall not be transferred or assigned by said party of the second part or by any person or persons claiming by, through, or under him without the consent of the party of the first part hereto endorsed in writing hereon.

And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in presence of

§ 33. Wayne County Abstract Company's Form.—Article of agreement, made this day of in the year of our Lord one thousand nine hundred and, between of the City of Detroit, in the County of Wayne and State of Michigan, party of the first part, and, of the same place, party of the second part in mannner following: The said party of the first part, in consideration of the sum of dollars to be to him duly paid, hereby agrees to sell unto the party of the second part all that certain piece or parcel of land lying and being situate in the in the County of and State of, and more particularly known and described as for the sum of dollars which the said party of the second part hereby agrees to pay the party of the first part as follows: dollars at the date hereof, and the remaining dollars with interest from on all sums

at any time unpaid hereon at the rate of six per cent. per annum till due, and thereafter at the rate of seven per cent. per annum till paid, payable.....herefrom. Said party of the second part as part of the purchase price also agrees to pay all taxes and assessments, extraordinary as well as ordinary, that shall be taxed or assessed on said premises from the date hereof until said sum shall be fully paid as aforesaid, within twenty-five days after the same shall become payable. If default be made on the part of the party of the second part in making such payment of taxes or assessments, said party of the first part shall have the right to pay the same and have the payment due hereon from the time of such payment with interest at seven per cent. per annum till paid.

Said party of the first part agrees that before or upon the completion of this contract he will furnish to said second party a Burton Guaranteed Certificate of Title, showing a marketable title to the above described premises in said first party.

And it is also agreed by and between the parties to these presents that the said party of the second part shall and will pay the expenses of keeping the buildings, erected and to be erected upon the lands above contracted for, insured against loss and damage by fire (in policies to be held by the party of the first part, with loss if any payable to vendor as interest may appear), by insurers in manner and amount approved by the said party of the first part, such expense to be chargeable hereon if paid by the party of the first part, with interest thereon at the rate of seven per cent. per annum. And that the said party of the first part, on receiving the aforementioned payment in full, at the time and in the manner above mentioned, and all sums chargeable in his favor hereon, and upon the surrender of the duplicate of this contract, shall at his own proper cost and expense, execute and deliver to the said party of the second part, or to his assigns, a good and sufficient conveyance of said described lands free and clear from all liens, and encumbrances,.....except such as may have accrued thereon subsequent to the date hereof by or through the acts or negligence of said party of the second part or his assigns.

It is mutually agreed between said parties that the said party of the second part shall have possession of said premises on and after this date while he shall not be in default on his part in carrying out the terms hereof, taking and holding such possession hereunder, and shall keep the same in as good condition as they are at the date hereof, until the said sum shall be paid as aforesaid and if said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have a right to declare the same void, and retain whatever may have been paid hereon, and all improvements that may have been made on said premises and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom.

It is further agreed by and between the parties hereto that this contract or any right or interest therein or thereunder shall not be transferred or assigned by said party of the second part or by any person or persons claiming by, through, or under without the consent of the party of the first part hereto endorsed in writing hereon.

And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

.....L. S.

.....L. S.

.....L. S.

Sealed and delivered in presence of

.....

§ 34. Union Trust Co. Form.—This contract, made this day of.....in the year one thousand nine hundred and.....between.....of the City of....., Wayne County, Michigan, party of the first part, and, party of the second part:

Witnesseth: That party of the first part in consideration of the payments to be made and the agreements to be performed by the party of the second part, as hereinafter set forth, agrees to sell and convey to the said party of the second part, the following described land, situated in the of, Wayne County, Michigan, to-wit:

.....
(here insert description of property). For the sum of..... dollars, which the said party of the second part agrees to pay to the said party of the first part as follows (here designate payments) including (or with) interest on all sums at any time unpaid hereon at the rate of.....per cent. per annum, till due and thereafter at the rate of seven per cent. per annum till paid, payable until said principal sum is fully paid.

It is a condition of this agreement that the party of the second part, his heirs and assigns, shall use the premises herein described for residence purposes only

Said party of the second part further agrees to enter said premises for taxation in his own name and to pay within 40 days after the same shall become payable all taxes and assessments, extraordinary as well as ordinary, that may be levied thereon, including the taxes thereon for the year 19.....

Said party of the second part further agrees that he shall and will keep the buildings and improvements upon and to be placed upon said premises insured in a responsible insurance company, and to an amount to be approved by the party of the first part, for the benefit of the party of the first part, until the purchase money is fully paid; and that said party of the second part shall and will keep the buildings and all other improvements upon said premises in good repair.

In case the party of the second part shall fail to pay all taxes and assessments or to insure the premises as hereinbefore provided the party of the first part may pay and discharge said taxes and assessments and effect such insurance and the amounts paid therefor by the party of the first part shall be deemed a part of the principal sum hereof, and become

payable forthwith, with interest at the rate of seven per cent. per annum, payable as aforesaid, until paid.

It is agreed, by the parties hereto, that the said party of the first part, on receiving payment in full of said principal and interest and of all other sums chargeable in his favor hereon, and the performance of all the agreements of the party of the second part herein contained, in the manner and at the time above limited therefor, and upon the surrender of this contract shall and will at his own proper cost and expense furnish a Union Trust Company Abstract, Guaranty or Certificate of Title and execute and deliver to said party of the second part, a good and sufficient Warranty Deed of said above described premises, free and clear of and from all liens and encumbrances, except such as may have accrued on said land or the buildings thereon subsequent to the date hereof, by or through the acts or negligence of any party or parties other than the party of the first part hereto and which deed shall contain the same building restrictions contained in this contract.

It is further agreed, that the said party of the second part shall have possession of said land upon the execution of this contract, and shall be entitled to retain possession thereof so long as there is no default upon his part in carrying out the terms of this contract.

It is further agreed, by the parties hereto, that time shall be of the essence of this contract and that if the said party of the second part shall fail to make any of the payments or perform any of the conditions above set forth, in the manner and at the time above limited therefor, the party of the first part shall, immediately after such failure, have the right to declare this contract void, and to retain whatever may have been paid hereon, and the premises, together with the buildings and improvements thereon as stipulated damages, and may consider and treat the party of the second part as his tenant holding over without permission, and may, without notice, written or otherwise, take immediate possession of the premises and remove the party of the second part therefrom.

It is further agreed, by the parties hereto, that the said party of the second part shall not assign this contract without the consent of the party of the first part being first endorsed in

writing hereon and on the duplicate copy hereof held by the party of the first part.

The covenants, conditions and agreements herein contained shall be for the benefit of and binding upon the several parties hereto, and their respective heirs, legal representatives, successors and assigns.

In witness whereof, the parties hereto have executed this agreement in duplicate the day and year first above written.

.....L. S.
.....L. S.
.....L. S.

In presence of

.....
.....

State of Michigan, }
County of} ss.

On this day of in the year one thousand nine hundred and....., before me, a notary public in and for said county, personally appeared (here insert name) to me known to be the same person described in and who executed the within instrument as vendor, who acknowledged the same to be his free act and deed.

.....,
Notary Public, Wayne County,
Michigan

My commission expires

§ 35. **Detroit Land Contract Form.**—This contract made this day of, in the year one thousand nine hundred and, between, of the City of Detroit, Wayne County, Michigan, party of the first part, and, party of the second part:

Witnesseth: Party of the first part, in consideration of the payment of, heretofore made to first party, receipt whereof is confessed and acknowledged, and the payments to be made, and agreements to be performed by the party of the second part, as hereinafter set forth, agrees to sell and convey to the party of the second part, the following described land,

situated in the of County, of Michigan,
to wit:

.....
.....
Party of the second part agrees to pay for said premises in addition to the sum of dollars heretofore paid, the sum of dollars in installments as follows: dollars or more on the day of and a like sum or more on the day of every month thereafter, with interest at the rate of six per cent. per annum on all principal sums at any time unpaid hereon, until due, payable at the time of the payments of said installments, and thereafter at the rate of seven per cent. per annum until paid, until the entire principal sum of dollars shall have been paid.

Party of the second part further agrees to enter for taxation in his own name, and pay within forty (40) days after the same shall become payable, all taxes, assessments, extraordinary as well as ordinary that may be levied thereon, including the taxes for the year 19....., also in case party of the first part is obliged to bring any action for the enforcement of this contract, party of the second part will pay the specific motrgage tax of \$5.00 per thousand dollars of the amount secured, and all costs of such action, including a reasonable attorney fee for serving notice of termination and representation of first party in court, not to exceed \$10.00. All such taxes, assessments, costs and expenses shall, if not paid by second party, upon demand be added to the balance of the principal sum due hereunder and shall bear interest thereafter at per cent. per annum.

Party of the second part will keep all buildings and improvements upon and to be placed upon said premises insured in a responsible insurance company, which party of the first part shall have the option of selecting, if he so desires, in an amount to be approved by first party for the benefit of first party until the purchase money is fully paid; and the said party of second part shall and will keep the buildings and all other improvements upon said premises in good repair. Should party of the second part fail to keep said buildings and improvements in-

sured, or to make necessary repairs to prevent damage to the buildings, party of the first part may effect such insurance and may cause said repairs to be made and the expense thereof shall be added to the principal sum due hereunder and bear interest at six per cent. per annum until paid.

Party of the second part accepts this contract subject to all or any building restrictions shown in the chain of title, and agrees to conform to same, and when the premises are finally conveyed to him, will accept a deed subject to such restrictions.

Party of the first part shall have the right to place a mortgage upon said premises for any part of the unpaid balance, and party of the second part upon paying this contract down to said mortgage will accept a deed subject to said mortgage and will assume and pay same.

Time shall be of the essence of this contract and if second party shall fail to make any of the payments or perform any of the conditions above set forth, in the manner, and at the time above limited therefor, party of the first part shall immediately after such failure have the right to declare this contract terminated and may thereupon retain whatever may have been paid thereon and the premises, together with all buildings and improvements, as stipulated damages for the breach of this contract, and rent for the use of said premises. In such event the premises shall be surrendered to first party and the said first party shall have the right to enter and repossess same, and second party shall be deemed and treated as a tenant, or tenants holding over without permission. Any notice of such termination may be given to second party by mailing same to his last known address, or by delivery to the premises. In addition to the foregoing remedy, but not in limitation thereof, first party shall in case of default of second party have the right to declare the entire balance due upon this contract and proceed to immediate collection hereof either by suit at law or in equity.

Upon the execution of this contract, and so long as party of the second part shall not have defaulted thereunder, party of the second part shall have possession of said premises, and upon payment to first party of the sums chargeable hereon,

and the performance of all agreements herein, in the manner and at the times above limited, party of the first part upon the surrender of this contract will execute and deliver to said party of the second part a good and sufficient warranty deed of said premises, warranting same against all liens and encumbrances, except such as may have accrued on said land or buildings thereon subsequent to the date hereof, by or through the acts or negligence of any party or parties other than the party of the first part hereto and except any and all restrictions heretofore imposed upon or against the use of said premises, and will also furnish an abstract of title showing marketable title in first party or parties.

Party of the second part shall not assign this contract without the consent of party of the first part being first endorsed in writing hereon, and no payments received by first party upon this contract after such assignment shall be deemed or considered an implied consent to such assignment.

The covenants, conditions and agreements herein contained shall be for the benefit of and binding upon the several parties hereto, and their respective heirs, legal representatives, successors and assigns.

In witness whereof, the parties hereto have executed this agreement in duplicate the day and year first above written.

..... (L. S.)
 (L. S.)
 (L. S.)
 (L. S.)

In presence of

.....

County of Wayne, }
 State of Michigan, } ss.

On this..... day of....., in the year one thousand nine hundred and, before me a notary public in and for said county, personally appeared....., to me known to be the same person described in and who exe-

cuted the within instrument as vendor, who
acknowledged the same to be free act and deed.

.....
Notary Public, Wayne County,
Michigan.

My commission expires

§ 36. Form of Land Contract with Special Tax Clause.—
The following is a form of land contract with a special tax clause whereby the vendee obligates himself to pay not only the taxes assessed against the property but all taxes which may be assessed against the contract or upon the interest of the vendor in such contract.

“This contract, made this (here insert date) between (here insert name of party of the first part) party of the first part and (here insert name of party of the second part) party of the second part.

Witnesseth, that the said party of the first part, in consideration of the sum of.....dollars to be to him duly paid as hereinafter specified, hereby agrees to sell and convey to the said party of the second part all the following described land, situated in (here insert place), to-wit: (here describe property), for the sum of dollars which the said party of the second part hereby agrees to pay to the said party of the first part as follows: (here designate how payments are to be made) with interest on all sums at any time unpaid hereon at the rate of.....per cent. per annum, payable annually.

It is agreed by the parties hereto, that the said party of the second part shall, during the life of this contract, pay and discharge within the time prescribed by law, all such taxes and assessments (extraordinary as well as ordinary) as shall by any lawful authority be imposed upon the premises above described, and, particularly, all taxes which shall be assessed upon this contract, or upon the contract interest of said party of the first part in and to said premises, by virtue of this contract, including the taxes for the year.....and that the payment by said party of the second part of such taxes on this contract, or the contract interest of said party of the first part,

shall not, in any case, be considered and treated as a payment on either the interest or the principal of this contract.

It is agreed by the parties hereto that in default of the payment of any or all of said above mentioned taxes and assessments, by said party of the second part, within the time prescribed by law, it shall be lawful for said party of the first part to pay any or all of said above-mentioned taxes and assessments, and the moneys thus paid by said party of the first part may be added to the amount due on this contract, payable forthwith with interest at the rate of per cent. per annum, and shall be treated as a part of the money payable under this contract.

It is agreed by the parties hereto, that said party of the second part shall have possession of said land, under this contract on the (here insert date).

It is also agreed by the parties hereto that if the said party of the second part shall fail to perform this contract, or any part of the same, the said party of the first part shall immediately after such failure, have the right to declare this contract void, and to retain whatever may have been paid hereon, and all improvements that may have been made on said land as stipulated damages for non-performance of this contract, and may consider and treat said party of the second part as his tenant holding over without permission, and may take immediate possession of said land, and remove said party of the second part therefrom.

And it is agreed that the stipulations herein contained are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written.

.....

Signed, sealed and delivered in presence of

.....

State of Michigan, }
 County of, } ss.

On this.....day of.....A. D. 19....., before me, the subscribed, a notary public in and for said county, personally appeared (here insert the name of the vendor) to me known to be the person named in and who executed the within instrument as vendor, and acknowledged that he executed the same as his free act and deed for the intents and purposes therein mentioned.

.....
 Notary Public, ... County,

My commission expires Michigan.

§ 37. Contract for Sale of Farm Land on Long Time.—This contract, made this.....day of.....A. D. 19....., between of of the first part, and of of the second part, witnesseth:

1. The said party of the first part, in consideration of the sum of.....dollars to be paid to the said party of the first part, and of the covenants to be performed by the said party of the second part, as hereinafter expressed, hereby agrees to sell to the said party of the second part, all that certain tract of land situated in the township of, County of and State of....., known and described as follows: etc., with the privileges and appurtenances thereunto belonging.

2. The said party of the second part in consideration of the covenants herein contained on behalf of the said party of the first part, hereby agrees to purchase the above described land and to pay for the same to the said party of the first part or his legal representatives the sum of.....dollars in manner following, that is to say, (state the terms of payment), with interest to be computed from the date of these presents at the rate of per cent. per annum, on the whole sum that shall be from time to time unpaid, and to be paid annually aforesaid and also that he will, so long as any part of the principal or interest of the said consideration money remains unpaid, well and faithfully in due season, in each and every year, pay or cause to be paid all taxes and assessments, ordinary and extraordinary,

that may for any purpose whatever be levied or assessed on said premises or on this contract; and that he will not commit or suffer any other person to commit any waste or damage to the said lands or the appurtenances except for firewood or otherwise for his own use, or while clearing the lands for cultivation in the ordinary manner.

3. The said party of the first part further covenants and agrees with the said party of the second part that upon the faithful performance by the said party of the second part of the covenants and agreements by him to be performed, and upon the payment of the several sums of money above mentioned, and the interest thereon, at the time and in the manner and at the place above mentioned, to the said party of the first part, that thereupon the said party of the first part will well and faithfully execute and deliver a good and sufficient deed or deeds, and thereby convey to the said party of the second part, his heirs and assigns, a good and unencumbered title in fee simple to the above described premises with their appurtenances.

4. It is further mutually covenanted and agreed by and between the parties hereto, that the said party of the second part may immediately enter on the said land and remain thereon and cultivate the same as long as he shall fulfill and perform all the agreements hereinbefore mentioned, on his part to be fulfilled and performed, and no longer; and that if he shall, at any time hereafter violate or neglect to fulfill any of said agreements, he shall forfeit all right or claim under this contract and be liable to said party of the first part for damages, and shall also be liable to be removed from the said land in the same manner as is provided by law for the removal of a tenant who holds over after the expiration of the time specified in his lease. And it shall be lawful for the said party of the first part, at any time after the violation or non-fulfillment of any of the said agreements on the part of the said party of the second part, to sell and convey the land, or any part thereof, to any other person whomsoever; and the said party of the first part shall not be liable in any way, or to any person, to refund any part of the money which he may have received on this contract, or for any damages on account of such sale.

And it is hereby expressly understood and declared that time is and shall be deemed and taken as of the essence of this contract, and that unless the same shall in all respects be complied with by the said party of the second part at the respective times and in the manner above limited and declared, that the said party of the second part shall lose and be debarred from all rights, remedies, or actions either in law or equity, upon or under this contract.

5. It is hereby agreed that this contract shall be binding on the respective representatives of the parties hereto.

In witness whereof, the parties to this agreement have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

§ 38. Form for Recording Payments on Land Contracts.—Attached to land contracts are usually forms for the registration and receipt of payments made by the vendee thereon. Such form, where the printed blank is used, is usually printed on the back of the contract and may be as follows:

Received payment of the within contract as follows:

Date	Principal Payments	Balance of Principal	Interest Payments	Paying Interest to	Signature
Payment Due on Delivery					

§ 39. Assignment of Land Contract, Long Form.—The following is an assignment of land contract attached to some of

the forms in general use among the legal profession. This form is more extended than the form given in the preceding section, but is not believed to be any more effectual. The assignment of a land contract need not be acknowledged by either the vendor or vendee unless it is intended to record such assignment.

In consideration of (here insert amount to be paid) to me in hand, paid by (here insert name of party contract is to be transferred to) and by and with the consent of the party of the first part in and to the contract of sale hereto annexed, the party of the second part in the within contract, does hereby assign and transfer the annexed contract to the said (here insert name of party contract is to be transferred to) his heirs and assigns.

And the assignee above named does hereby accept the above assignment, and in consideration of the assent of said first party in and to said contract to said transfer, does hereby covenant and agree to assume and fulfill all the obligations thereof on the part of the said assignor to be fulfilled.

And, said first party in and to said contract does expressly consent to the foregoing assignment.

Dated at _____, this _____ day of _____.

Signed, sealed and delivered in presence of

State of Michigan, }
County of _____, } ss.

On this _____ day of _____, 19____, before me, a notary public in and for said county, personally appeared (here insert name of first party to assignment) known to me to be the person who executed the foregoing assignment of contract, and acknowledged the same to be his free act and deed.

Notary Public, _____ County,
Michigan.

My commission expires _____

§ 40. Assignment of Land Contract, Short Form with Consent of Vendor.—The following is a form of assignment of land contract in common use in Michigan by the legal profession, together with a form of consent by the vendee, and the acceptance and agreement by the assignee of the vendee to carry out the terms and conditions of the contract. This form is sufficient to comply with all the statutory provisions relating to land contracts, but such assignment cannot be recorded unless the original contract has been acknowledged by the vendor.

Consent by Vendor.

Detroit, Michigan.

I (or we) hereby consent that the interest of (here insert name of party of the second part) in the within contract be assigned to (here insert name of party to whom interest is being assigned to) subject to all the conditions and obligations therein contained.

.....L. S.

Assignment by Vendee.

In consideration of dollars, to me in hand paid, I do hereby sell, assign and transfer unto (here insert name of party to whom interest is being assigned) all my right, title and interest in and to the within contract, and advantages to be derived therefrom.

.....L. S.

Acceptance of Assignment by Assignee as Vendee.

I, assignee above named, do hereby accept the above assignment, and do hereby covenant and agree to and with (here insert name of party of first part), the party of the first part to the within contract, in consideration of his (or her) consent above given, to assume, perform and carry out with him (or her) all the conditions and obligations therein contained on the part of the party of the second part thereto to be performed.

.....

§ 41. Contract for the Sale of City Lots, Vendor to Advance Funds for Building.—This contract made and entered into this

(here insert date), by and between (herein insert name of vendor), of (here insert residence of vendor, including city, county and state), hereinafter referred to and designated as party of the first part and (here insert name of vendee), of (herein insert residence of vendee, city, county and state) hereinafter referred to and designated as party of the second part, Witnesseth:

1. Party of the first part agrees to sell and party of the second part agrees to purchase for the sum of dollars, all that certain piece or parcel of land situate, lying and being in the of county, of more particularly described as follows: (herein insert detailed legal description); in fee simple and possession free and clear from all encumbrances.

2. Said purchase price shall be paid by party of the second part to the party of the first part in the following manner to-wit; the sum of dollars upon the execution of this contract, receipt hereof is hereby acknowledged, and the balance of such purchase price on installments of dollars or more at the option of the party of the second part, all payments to be made at Street, in the City of Detroit. or elsewhere in said city as party of the first part may direct and party of the first part agrees to convey to party of the second part at any time upon demand the aforesaid real estate, provided that the above named price for said land shall have been paid in full by party of the second part to party of the first part and that all advances made by party of the first part to party of the second part for the construction of the house built and erected upon the same. It is farther agreed that party of the second part shall pay to party of the first part, interest at the rate of per cent. per annum on said purchase money from the day of, and interest at the same rate on all advances made by party of the first part to party of the second part as herein contemplated until said purchase price shall have been completed.

3. The party of the second part shall be entitled to the immediate possession of the said piece or parcel of land, and shall bear and pay all taxes, rates and assessments in respect to

the same as if the said piece or parcel of land had been conveyed to him.

4. The party of the second part shall not dig for or remove from said piece or parcel of land or any part thereof any gravel, sand, clay or other substance, beyond the necessary excavations for the buildings to be erected thereon, without previous consent in writing of the party of the first part.

5. The party of the second part shall, within one calendar month after the execution of these presents, commence, and without intermission and with reasonable expedition, proceed with the erection of on the said piece of land, and shall completely finish, fit for habitation, the said, on or before the day of

6. Such houses shall front upon street aforesaid, and shall be erected in a proper, workmanlike manner, in accordance with plans and specifications to be first approved of in writing by the party of the first part's architect, and shall be built of good materials, and the said houses shall be set back feet from said street.

7. If the party of the second part shall in all respects observe and perform his part of the contract, party of the first part will advance to him for the purpose of assisting him in the erection of said house the sum of dollars in respect to said house in the following manner, to-wit:..... but it is hereby agreed in respect to such advances that party of the first part shall not be required to make any advance towards the construction of said house unless such building exclusive of the value of the land shall be equal in value to one-third more than the aggregate of the sums advanced. At any particular time an advance may be required application for each advance shall be made not less than days before the same is payable.

It is farther agreed and understood that party of the first part shall be furnished with true and correct copies of all bills for material and all expenditures made on behalf of labor, weekly from time to time as such building may progress and failure to furnish such bills and such true and correct state-

ments of labor expended on said building shall justify party of the first part to discontinue such advances.

8. It is farther agreed between the parties that sworn statements shall be furnished by party of the second part before requiring any additional advances on said building after the first, giving the names and addresses of all persons who have worked on said building and the amount of wages due and earned by such persons and the amount of wages, if any, unpaid and shall also in such sworn statement give the names of persons, firms or corporations from whom material has been purchased which has gone into the construction or erection of said building.

9. The party of the second part shall, at his own expense insure the buildings to be erected on said land, and any building materials for the time being thereon, for the benefit and security of the party of the first part, in a sum or sums equal in amount to any advances made pursuant to this agreement.

10. The party of the second part shall at his own expense, insure land and all the buildings for the time being erected or in the course of erection thereon, and upon all the building materials and other things which shall for the time being be brought upon the said land, or the streets and passageways adjoining the same, as well as for the said purchase money and the interest thereon as also for such sums of money as the party of the first part may have advanced or paid as herein provided.

11. When and as soon as the party of the second part shall have paid to the party of the first part the purchase money of said land or any house-lot of the same, together with all sums of money advanced or paid by the party of the first part in respect to any building or buildings thereon, pursuant to this agreement, the party of the first part shall execute a proper conveyance of said land or house-lot, and such deed shall contain covenants on the part of the purchaser, his heirs, executors, administrators, and assigns, with the party of the first part, his heirs and assigns, that no buildings which shall be erected upon said piece of land shall be used for the purpose of carrying on any trade, business or manufacture, or for

any purpose which may be or become a nuisance or annoyance to the neighborhood, and that an area of the depth of..... feet from.....street aforesaid shall at all times hereafter be left open and unbuilt upon except that bay windows may project over the same, not more than.....feet from the house to which they belong; and also that the purchaser, his heirs or assigns, will from time to time pay one-half of the expense of keeping in repair so much of the said passageway as is co-extensive with the said piece or lot of land.

12. The party of the second part shall be entitled to have said piece of land conveyed to him by several conveyances, not exceeding the number of house-lots into which said land may be divided, upon payment to the party of the first part on account of said purchase money of the sum of.....for each front foot of land to be comprised in such conveyance, with interest thereon as aforesaid, and the advances made by the party of the first part in respect of the buildings erected on the land to be comprised in such conveyance, with interest as aforesaid, and all sums paid for insurance and the interest due in respect thereof, provided that the party of the first part shall not at any time require a conveyance of part of the said land under this clause, unless at the time of such conveyance he shall have proceeded with the erection of at least.....on the land remaining and shall have complied in all respects with the provisions herein contained.

13. If default shall be made by the party of the second part in the observance and performance of his part of this agreement in any particular, and time shall be deemed to be of the essence of the contract, or if the purchaser shall become bankrupt or make any composition with, or any assignment for, the benefit of his creditors, then and in such case it shall be lawful for the party of the first part to re-enter upon such land or any part thereof not previously conveyed to the party of the second part, and by notice in writing to be delivered to the party of the second part or left for him at his usual and last known place of abode, absolutely to determine this agreement so far as relates to such portion of said land as may not previously have been conveyed to the purchaser.

14. If this present agreement shall be determined by the vendor under the preceding clause so much of the said land as shall not have been conveyed to the purchaser pursuant to this agreement, together with the buildings thereon, and all building materials which under the previous clauses of this agreement are provided to be attached and belong to the said land or the buildings thereon, shall immediately after the delivery of the notice to determine this agreement, be and remain the absolute property of the party of the first part freed and discharged from all claims and demands of the party of the second part in respect thereof or otherwise on account of this agreement, and the party of the second part shall thenceforth be freed and discharged from all obligations created by this agreement, and which then remain unperformed.

In Witness whereof, etc.

§ 42. **Power of Attorney to Lease or Sell Land.**—Know All Men by These Presents, That I, (herein insert name of grantor) of (herein insert name of City) County of (herein insert name of County) State of Michigan, do by these presents constitute and appoint (herein insert name of person to whom Power of Attorney is given) of (herein insert name of City) County of (herein insert name of County) State of Michigan, my true and lawful attorney for me and in my name, place and stead to lease the following described real estate to-wit; (herein insert description of property) to such person or persons, and for such term or number of years, or for life or lives, and at and under such yearly and other rents as he shall think fit and proper or to otherwise sell and dispose of said real estate or any part thereof absolutely in fee simple for such price or sum of money and to such person or persons as he shall think fit and convenient and also for me in my name and as my act and deed to sign, seal execute and deliver such deeds and conveyances for the leasing of or for the absolute sale and disposal thereof of said real estate or any part thereof, with such clauses, covenants and agreements to be therein contained as my said attorney shall think fit and expedient; Hereby ratifying and confirming all such leases, deeds, conveyances, bar-

gains and sales which shall at any time hereafter be made by my said attorney touching and concerning the aforesaid premises.

In Witness Whereof, I have hereunto set my hand and seal this.....day of.....A. D. 19.....

Signed, sealed and delivered
in the presence of,

State of Michigan, }
County of.....} ss.

On this.....day of.....A.D.....before me, the undersigned, a notary public in and for the said county, personally appeared..... (here insert the name of grantor of power of attorney) to me well known, who acknowledged the execution of the foregoing power of attorney as his free act and deed for the intents and purposes herein mentioned.

.....
Notary Public.

.....County, Michigan.

My commission expires.....

CHAPTER IV

LAND CONTRACTS, NATURE OF ESTATE CREATED, EXECUTION, PARTIES, CONSTRUCTION, MISCELLANEOUS TOPICS

- § 43. Nature of Estate Created by Land Contract.
- § 43A. Wife Need Not Join With Vendee in Assignment of Contract—
Exceptions.
- § 44. Nature of Estate Where Vendees are Husband and Wife.
- § 45. Respective Shares When Vendees are Husband and Wife Joined
With Others.
- § 45A. Effect of Mutual Releases of Property.
- § 46. Land Contracts, Capacity of Parties.
- § 47. Land Contracts, Execution, Statutory Requirements.
- § 48. Consideration Need Not Be Stated in Contract.
- § 49. Land Contracts Acknowledgment and Registration.
- § 50. Form of Acknowledgment, Statutory Provision.
- § 51. Authentication of Written Instruments Executed Outside of the
State.
- § 52. Acknowledgments in Other States and Territories.
- § 53. Acknowledgment of Contracts Executed in Foreign Countries.
- § 54. Land Contracts Defectively Executed, Curative Statutes.
- § 55. Land Contracts as Evidence (Certified Copy).
- § 56. Discharging Land Contracts of Record.
- § 57. Registration of Land Contracts Where Land Affected Lies in Two
or More Counties:
- § 58. Possession by Vendee as Constructive Notice of Contract.
- § 59. The Specific Tax on Land Contracts.
- § 60. Basis of Computing Specific Tax on Land Contracts.
- § 61. Sale of Expectant Interests.
- § 62. Vendor's Equitable Lien for Unpaid Purchase Price.
- § 62A. Mechanics' Liens on Interest of Vendee.

§ 43. Nature of Estate Created by Land Contract.—A contract for the sale of land, where the vendee is given possession of the premises, conveys to the vendee the equitable title thereto.¹ While at law the title remains in the vendor as security

1. Fitzhugh v. Maxwell, 34 Mich. Bank v. Proaty, 158 Mich 656. Har-
138. Gates on Real Property, Sec. ris v. Brown, 172 Mich. 164.
614A. Midland County Savings

for the performance of the obligation of the contract, yet in equity the contract conveys it to the vendee. The equitable rights of the vendee are alienable, descendable, and devisable in like manner as real estate held by legal title.²

At the death of the vendee, the interest of the estate in the contract passes to the heirs as real property, and not the administrators.

The interest of the vendor is held to be personal property³ and at the death of the vendor, passes to the administrator of the vendor rather than to the heirs. Notwithstanding several decisions cited below holding that the interest of the vendor is personal property, and descends to the administrator, the Supreme Court has decided in an earlier case⁴ that the widow is entitled to dower in the interest of her husband as a vendor in a land contract. A careful examination of the case just referred to will disclose that it is not inconsistent with the subsequent decisions cited in the note.

A clear exposition of the nature of the estate created by land contract can be found in the note containing an excerpt from a recent English case.⁵

2. Gates on Real Property, 614A. *Lewis v. Hawkins*, 90 U. S. (23 Wall) 119, 23 L. Ed. 113. *Hardin v. Boyd*, 113 U. S. 765, 28 L. Ed. 1144. *Bradley v. Curtis*, 79 Ky. 327. *Adams v. Cowherd*, 30 Mo. 460. *Dukes v. Turner*, 44 Iowa 575. *Fitzhugh v. Maxwell*, 34 Mich. 138.

3. *Bowen v. Lansing*, 129 Mich. 117 (119-121). *City of Marquette v. Iron Co.*, 132 Mich. 130. *Re Stanton's Estate*, 142 Mich. 491.

4. *In re Estate of Pulling*, 97 Mich. 376.

5. *Pomeroy Equity Jurisprudence*, Sec. 126. In the recent case of *Laysaght v. Edwards*, L. R. 2 Ch. Div. 499, 506, 507, Sir George Jessel, M. R., states the effect of a contract for the sale of land as follows: "It appears to me that the effect of a contract for sale has been settled

for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee (that is, a person without

§ 43A. **Wife Need Not Join With Vendee in Assignment of Land Contract—Exceptions.**—The wife of a vendee, under a land contract, has no dower interest in such contract, and she is not, therefore, under the Michigan decisions required to execute an assignment of a land contract in order to bar her interest in such contract.⁶

None of the cases, however, cited in the note settle the ques-

beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate, and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has the right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, 'Either pay me the purchase-money or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract, time is given by a decree of the court of equity, and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate (i. e., equitable as well as legal owner). But that, as it appears to me, is a totally different thing from the contract being cancelled, because there was some equitable ground for setting it aside. Being a valid contract, it has this remarkable effect, that it converts

the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser. If it is a house, that is sold, and the house is burned down, the purchaser loses the house. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it."

6. *Stevens v. Leonard*, 122 Mich. 125. *Dalton v. Mertz*, 197 Mich. 390. Holding that a wife's signature was not necessary to the transfer of the land contract by assignment. *Dally v. Litchfield*, 10 Mich. 29. *Beebe v. Lyle*, 73 Mich. 114.

tion as to whether or not, where the assignment of the contract covered a homestead, would require the signature of the wife. Compiled Laws, 1915, Sec. 12889, provide with respect to a homestead that the alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same. In view of this statute, there is some question as to whether or not the wife's signature would be required in transfers involving the homestead, and the safer practice would be to procure her signature in assignments involving transactions of this character.⁷

§ 44. Nature of Estate Where Vendees are Husband and Wife.—Where a husband and wife are named as vendees in a land contract, it frequently occurs that one or the other may die before the conditions of the contract are discharged, and the vendor is required to make conveyance of the property. Where there are children, or other heirs of the deceased spouse living in addition to the wife or husband of such deceased spouse, the question then presents itself as to whether the interest of such vendees was an estate by the entirety, and upon the death of one of the vendees to the contract, the interest of such deceased spouse passes to the survivor.

In such cases, the interest of the vendees arising from such a contract is an estate by entirety, and upon the death of either spouse the entire interest of the land contract descends to the survivor, and the children of such deceased spouse, or other heirs take no interest in the property.⁸ and ⁹

7. *Matta v. Kippola*, 102 Mich. 117.

8. The facts in the case of *Robson v. Townley*, 176 Mich. 581, are as follows: "William Robson acquired a certain farm by homestead entry. Suffering certain financial vicissitudes, certain mortgages were foreclosed on this property, and finally to pay his obligations Robson and his wife joining, as of course she would have to do, executed a warranty deed to one David Brown and took back a land contract, whereby upon the payment of a stipulated amount to be made in

payments and at certain times, Brown was to convey to William Robson and Elizabeth Robson, his wife, by warranty deed the said land, free and clear from all encumbrances. This contract is made between David Brown and William Robson and Elizabeth Robson, his wife, in the usual form, the contract in full being found in defendant's Exhibit 'A', Supreme Court Record 635, June Term, 1913.

On August 16th, 1901, William Robson died and about two years later his wife, Elizabeth Robson,

§ 45. Respective Shares When Vendors are Husband and Wife, Joined with Others.—It follows, therefore, from the doctrine discussed in the foregoing section that the husband and wife as vendees in a land contract take by the entirety as one interest, and when they are named as vendees in such contract with another person they take together the fractional interest of one person instead of two; thus, where A and B, husband and wife are named as vendees in a land contract with D, D will hold one-half interest in the premises, and A and B together a moiety of the property.⁹

This doctrine has been confirmed by statute.¹⁰ If the conveyance to a husband and wife expressly provides that they shall take as tenants in common the prevailing modern doctrine is that they will not take by entireties.¹¹

died. The bill of complaint in the above case of *Robson v. Townley* was filed by the ten surviving heirs-at-law of William Robson for partition of the premises. Under the contract, upon compliance with its terms, Robson and his wife were entitled to have a deed from Brown creating the estate by the entireties, which, on the death of Robson, would have gone to his wife by the right of survivorship. If Robson had outlived his wife, unquestionably his heirs would have been entitled to inherit. It, therefore, clearly appears that if the contract had been carried out, the situation would have been the same as now left by the decree of the court, and complainant has no right to complain, and is not entitled to the relief prayed for." See discussion in *Gates on Real Property*, Sec. 467. *Forlich v. Blackstone*, 155 Mich. 604; *McMillan v. Schneider*, 147 Mich. 263; *Bauer v. Long*, 147 Mich. 351.

9. It is now well settled that where a vendee's interest in a contract has been assigned to a hus-

band and wife, they take as tenants by the entirety. *Stevens v. Wake-man*, 213 Mich. 560-567; *Lergen v. Roiser*, 200 Mich. 328-341; *Auditor General v. Fisher*, 84 Mich. 128-132; *Barber v. Harris*, N. Y. 1836, 15 Wend. 615; *Jacobs v. Miller*, 50 Mich. 119 (124) 15 N. 42; *Dowling v. Salliotte*, 83 Mich. 131 (135-136), 47 N. W. 225; *Re. Appeal of Nellie Lewis*, 85 Mich. 340 (343-346); *Ful-lager v. Stockdale*, 138 Mich. 363 (367-368), 101 N. W. 567.

10. All grants and devises of lands, made to two or more persons except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy. Sec. 11562 C. L. 1915. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife. Sec. 11563 C. L. 1915.

11. *Stewart, On Husband and Wife*, 307-310; *Tiedman, On Real Property* (3 Ed.), 183; *Freeman, On Co-tenancy and Partition*, 72;

§ 45A. **Effect of Mutual Releases of Property.**—When marital difficulty arises, the husband and wife frequently execute property settlements in which they mutually “release and surrender” all claims in each others property.

If the language in such contracts is clear and decisive and indicates a present intent to mutually release and transfer the respective rights of the parties in each others property, courts of equity will uphold such transfers and agreements even though they are not accompanied by deeds of conveyance, provided of course the contract is fair to the parties, and free from fraud and deceit.¹²

§ 46. **Land Contracts, Capacity of Parties.**—The mental capacity to enter into a contract is absolutely necessary to formation of a binding agreement, therefore, inability to exercise the reasoning faculties or to give an intelligent assent to the terms of the contract through insanity or mental deficiency by any of the parties thereto will prevent the formation of a valid contract,¹³ this is too elementary to require the citation of authority.

Minor v. Brown, 133 N. Y. 308;
Hiles v. Fisher, 144 N. Y. 306;
Wales v. Coffin (95 Mass), 13 Allen
 213; *McDermott v. French*, 15 N. J.
 Eq. 48; *Bidler v. Robinson*, 73 N. J.
 Eq. 169; *Fladung v. Rose*, 58 Md. 13.

12. *Barton v. Barton*, 147 Mich.
 318. In the *Barton* case, for a
 certain consideration, namely, of
 agreed payments to be made the
 wife “surrendered all claims to and
 right for dower, support, and all
 claims of every name, nature and
 description.” The husband then
 died testate and the wife sought
 to obtain her widow’s share of the
 testator’s estate. It was held that
 the contract being fully executed,
 followed by a consideration, pre-
 vented the wife from enforcing any
 claim against the husband’s estate

as his widow. This opinion con-
 tains an interesting discussion in
 which a number of cases are dis-
 cussed and distinguished. In *re*.
Geannott’s Estate, 212 Mich. 442:
 In this case a contract was exe-
 cuted between the husband and
 wife in which the following lan-
 guage was used: “And does hereby
 release all dower rights which she
 now has or may hereafter have in
 any property of the said Jos. C.
Geannott, each of said parties do
 hereby release any claim which
 they have or may hereafter have
 in or to the property of the other.”
 The husband in this case attempted
 to claim an interest in the estate of
Florence Geannott and the court
 held he could not do so.

13. *Elliott On Contracts*, Sec. 260.

Capacities to make a contract is the exception and not the general rule, therefore the law presumes that there is a full capacity to contract. Persons entering into an agreement will be presumed to be adults and competent to enter into the contract they have made.¹⁴ The incapacity to enter into a contract might be classified under two general heads: they are, natural incapacity, such as insanity or imbecility including drunken persons, and those who are made by operation of the law incapable of entering into the contract, such as infants and married women, at common law. For a full discussion of this subject, which is not peculiar to land contracts, and therefore not fully treated here, the reader is referred to a general work on contracts relating to this subject.¹⁵

§ 47. Land Contracts, Execution, Statutory Requirements.—By statute ¹⁶ it is provided that contracts for the sale of land shall be executed in the presence of two witnesses who shall subscribe their names as such, and the vendor may acknowledge the same before a notary public or other official entitled to take such acknowledgment within this state. The vendee need not acknowledge the contract, but must sign it. It should be noted that the statute does not require the contract to be

14. Elliott On Contracts, Sec. 261; *Hickson v. Aylward*, 3 Moll. 15; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. 950; *Paulus v. Reed*, 121 Iowa 224, 96 N. W. 757; *Merchants Nat. Bank v. Soesbe*, 138 Iowa 354, 116 N. W. 123; *Nason v. Chicago, etc., R. Co.*, 149 Iowa 608, 128 N. W. 854 (holding mere physical weakness as a general rule insufficient to avoid a contract); *Mathews v. Nash*, 161 Iowa 125, 130 N. W. 796; *Farnam v. Brooks*, 9 Pick (Mass.) 212; 1 Elliott, On Ev., Sec. 125-126; 3 Elliott On Ev., Sec. 2266; see also, *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141; *Hauber v. Liebold*, 76 Nebr. 706, 107 Admr. 78 Vt. 173, 64 Atl. 1110.

15. Elliott On Contracts, Sec. 262.

16. That contracts for the sale of land or any interest therein, shall be executed in the presence of two witnesses, who shall subscribe their names thereto as such, and the vendor named in such contract, and executing the same may acknowledge the execution thereof before any judge, or commissioner of a court of record, or before any notary public or justice of the peace within this state; and the officer taking such acknowledgment shall endorse thereon a certificate of the acknowledgment thereof, and the date of the making the same under his hand. Sec. 11770 C. L. 1915.

acknowledged by the vendor but provides that he may acknowledge such contract.

If the vendor does not acknowledge the contract the same will not be entitled to registration.¹⁷ Neither acknowledgment by the vendee or vendor is necessary to make the instrument valid between the parties.¹⁸

§ 48. Consideration Need Not Be Stated in Contract.—It is provided by the statute¹⁹ that the consideration of any contract or agreement, required to be in writing, need not be set forth in the contract or agreement or in the note or memorandum thereof but may be proved by legal evidence.

§ 49. Land Contracts Acknowledgment and Registration.—If the vendee of a land contract desires to record the same so that the record thereof will be notice to his rights in the contract, care should be exercised to see that the vendor executes a proper acknowledgment of the contract, as such an acknowledgment is an essential prerequisite to the legal recording of such contract, in the absence of which the record is of no validity so far as providing notice to any third party of the vendee's rights.²⁰

While it is not essential that the certificate of acknowledgment shall be in any prescribed form, nevertheless, the essential fact must appear in the certificate or in other portions of

17. No deed, mortgage or other instrument in writing, which by law are required to be acknowledged, affecting the title to lands, or any interest therein, shall be recorded by the register of deeds of any county, unless the same shall be duly witnessed and acknowledged, or proved as provided by this chapter and the amendments thereto. Sec. 11748 C. L. 1915.

18. *Dougherty v. Randall*, 3 Mich. 581; *King v. Carpenter*, 37 Mich.

369; *Prive v. Haynes*, 37 Mich. 489; *Baker v. Clark*, 52 Mich. 22.

19. "The consideration of any contract or agreement, required by the provision of this chapter to be in writing, need not be set forth in the contract or agreement or in the note or memorandum thereof, but may be proved by any other legal evidence. (C. L. 1915, 11978; history, C. L. 57, 71, 4695; How. 6182 C. L. 97, 95112, consideration; *Smith v. Sheridan*, 175 Mich. 403.)

20. Sec. 25 in the entry books

the instrument. If the vendee is in possession of the property, such possession is notice to the world without any recording of the instruments, but difficulty may arise in connection with possession of vacant property where neither the vendor or vendee exercises acts of ownership in relation thereto, in such case to protect the vendee, he must either record the contract or exercise acts of ownership over the property which will be notice to the world.

Where the initial payment made upon a land contract is small, it is not usually customary to record such contracts, therefore the acknowledgment thereof is not important, the vendee in such cases relying upon the financial responsibility and honesty of the vendor to carry out the terms of the contract and make conveyance in accordance with the terms thereof, but where a substantial sum of money is paid, as the initial payment, or substantial rights are involved in such contract, it would seem desirable to have the same recorded and not trust to the financial exigencies which the vendor may experience.

(book) of deeds the register shall enter all deeds of conveyance absolute in their terms, and not intended as mortgages or securities, and all copies left as cautions and in the entry book of mortgages he shall enter all mortgages and other deeds intended as securities, and all assignments of any such mortgages or securities; and in the entry book of levies he shall enter all levies, attachments, notices or lis pendens, sheriff's certificates of sale, and United States Marshal's certificates (Certificate) of sale, noting in such books, the day, hour and minute of the reception and other particulars, in the appropriate columns in the order in which such instruments shall be considered as recorded at the time so noted. And the said record of such levies attachments, notices, lis pendens, sheriff's certificates, marshal's certificates, and the original papers re-

quired by the statute to be filed to perfect such levies, attachments, notices, lis pendens and certificates on file in the office of the register of deeds, shall be notice to all persons, of the liens, rights and interests acquired by or involved in such proceedings, and all subsequent owners or incumbrancers shall take subject to such liens, rights or interests.

Any contract, executed and acknowledged according to the foregoing provisions, shall, with the certificates thereto attached, be entitled to be recorded in the office of the Register of Deeds of the county where the lands lie, and the recording of the same shall have the same force and effect as to subsequent encumbrances and purchasers, as the recording of deeds and mortgages, as now provided by law. Sec. 11773 C. L. 1915.

§ 50. Form of Acknowledgment Statutory Provision.—The statute provides several forms for the acknowledgment of instruments for natural persons acting in their own right, for natural persons acting by attorney and for corporations or joint stock associations. Those forms are as follows:

(1) Beginning in all cases by a caption specifying the state and county where the acknowledgment is taken.

(a) In the case of natural persons acting in their own right:

On this day of 19...., before me personally appeared A. B. (or A. B. and C. D.), to me known to be the person or persons described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

(2) In the case of natural persons acting by attorney:

On this day of 19.... before me personally appeared A. B. to me known to be the person who executed the foregoing instrument in behalf of C. D. and acknowledged that he executed the same as the free act and deed of said C. D.

(3) In case of corporations or joint stock associations:

On this day of, 19...., before me appeared A. B. to me personally known, who being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association), of (describing the corporation or association) and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees) and said A. B. acknowledged said instrument to be the free act and deed of said corporation (or association).

In case the corporation or association has no corporate seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or association), and that" and add, at the end of the affidavit clause, the words "and that said corporation (or association) has no corporate seal."

In all cases add signature and title of the officer taking the acknowledgment.

§ 51. Authentication of Written Instruments Executed Outside of the State.—The statute provides a form of authentication of deeds or other written instruments when taken outside this state and within any other state or territory or district of the United States.²³ In case the acknowledgment has been taken by a notary public of any other state (or territory), his notarial seal attached to the instrument will be a sufficient authentication, and such instrument may be read in evidence in a court of this state or recorded without any additional certificate. If the magistrate be one not possessed of a seal such as a justice of the peace, or other official, then the instrument must be authenticated in accordance with the form laid down in the statute.

§ 52. Acknowledgments in Other States and Territories.—The statute provides that contracts executed in other states and territories of the United States may be executed in accordance with the laws of such states, territory or district or in accordance with the laws of the State of Michigan²⁴ and

23. Sec. 175 C. L. 1915. Begin with a caption specifying the state, territory or district, and county or place where the authentication is made.

"I, ..., clerk of, in and for said county, which court is a court of record, having a seal (or I, ..., the secretary of state of such state or territory) do hereby certify that, by and before whom the foregoing acknowledgment (or proof) was taken, was at the time of taking the same, a notary public (or other officer) residing or authorized to act in said county, and was duly authorized by the laws of said state (territory or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory or district) and further that I am well

acquainted with the handwriting of said and that I verily believe that the signature of said certificate of acknowledgment (or proof) is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (or state) this day of, 19.....
Sec. 11759 C. L. 1915.

24. If any such contract be executed in any other state, district or territory, the same shall be executed and acknowledged in the same manner as provided in section nine of chapter one hundred and fifty of the Compiled Laws of eighteen hundred and seventy-one for the execution of deeds in any other state, district or territory.
Sec. 11771 C. L. 1915.

may be acknowledged before any judge or any court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the laws of the state, territory or district, to take acknowledgments therein, or before any commissioner appointed by the governor of the state for such purposes.²⁵

The forms of acknowledgment set forth in the preceding section may be used.

§ 53. Acknowledgment of Contracts Executed in Foreign Countries.—If the contract, be executed in a foreign country it may be executed in accordance with the laws of such country and the execution thereof may be acknowledged before any notary public therein or before any minister resident, charge d'affairs, commissioner or consul of the United States, and the instrument will nevertheless be valid whether executed in accordance with the laws of such country or the laws of this state.²⁶

25. "If any such deed shall be executed in any other state, territory or district of the United States, such deed may be executed according to the laws of such state, territory or district, and the execution thereof may be acknowledged before any judge of a court of record, notary public, justice of the peace, master in chancery, or other officer authorized by the laws of such state, territory or district, to take the acknowledgment of deeds therein, or before any commissioner appointed by the governor of this state for such purpose." Sec. 11695 C. L. 1915. Sec. 9 Chapter 160, 1871.

26. If any such contract be executed in any foreign country it may be executed and acknowledged according to the provisions contained in section eleven of chapter one hundred and fifty, Compiled Laws of eighteen hundred and seventy-one, providing for the execution of

deeds in any foreign country. Sec. 11772 C. L. 1915. "If such deed be executed in any foreign country it may be executed according to the laws of such country, and the execution thereof may be acknowledged before any notary public therein or before any minister plenipotentiary, minister extraordinary, minister resident, charge d'affairs, commissioner, or consul of the United States, appointed to reside therein; which acknowledgment shall be certified thereon by the officer taking the same under his hand, and if taken before a notary public his seal of office shall be affixed to such certificate provided that all deeds of land situated within this state, heretofore or hereafter made in any foreign country, and executed in the presence of two witnesses, who shall have subscribed their names to the same as such, and the execution thereof shall have been acknowl-

§ 54. **Land Contracts Defectively Executed, Curative Statutes.**—Those sections of the statute relative to the formal requisite of a land contract must be construed in connection with a remedial section of the statute²⁷ which provides that no conveyance of land or instrument intended to operate as such conveyance, made in good faith and upon valuable consideration shall be wholly void by reason of any defects or any statutory requisites in sealing, signing or attestation, acknowledgment or certificate of acknowledgment thereof. In construing this section it has been held that where a contract only had one witness it was nevertheless constructive notice and was not void.²⁸

It has also been held that record of a deed with defective acknowledgment operates as a notice of right secured by deed where the instrument was made in good faith and on valuable consideration and intended to operate as a conveyance.²⁹

edged by the persons executing the same before any one of the officers authorized by this section to take such acknowledgment, and such acknowledgment shall have been certified thereon, as above required, shall be deemed between the parties thereof and all parties claiming under or through them, as valid and effectual to convey the legal estate of the premises therein described; and whenever such deed has been recorded in the office of the register of deeds of the proper county such record shall be effectual for all purposes of a legal record, and the record of such deed, or a transcript thereof, may be given in evidence as in other cases; provided, that nothing herein contained shall impair the rights of any person under a purchase heretofore made in good faith and on valuable consideration." Sec. 11697 C. L. 1915. This is C. L. 1871, Sec. 11, Chap. 1, referred to above. C. L. 1915, Sec. 11755.

27. No conveyance of land or in-

strument intended to operate as such conveyance, made in good faith and upon a valuable consideration whether heretofore made or hereafter to be made, shall be wholly void by reason of any defect in any statutory requisite in the sealing, signing, attestation, acknowledgment, or certificate of acknowledgment thereof; nor shall any deed or conveyance, heretofore or hereafter to be made, designed and intended to operate as a conveyance to any religious or benevolent society or corporation, be wholly void by reason of any mistake in the name or description of the grantee, nor because of any failure of such society or corporation to comply with any statutory provisions concerning the organization of such society or corporation. C. L. 1915, Sec. 11784.

28. *Aultman Miller & Co. v. Pet-ty*, 59 Mich. 486.

29. *Brown v. McCormick*, 28 Mich. 214.

The record of a deed executed in the state of New York in 1839 and recorded in 1846 was entirely lacking of any clerk's certificate of authentication of due execution operated as a legal notice of all rights secured under it, all such defects being clearly within the letter and spirit of the statute.³⁰ The Michigan Supreme Court has also held that an antenuptial contract with one witness is sufficient notice and is good against a mortgage subsequently executed by the husband only contrary to the provision of such contract.³¹ A contract without any witnesses is not wholly void but is constructive notice of the content thereof.³² In another case, where the contract was not witnessed, the court held the same to be not void but sufficient under the showing made to entitle the vendee to specific performance.³³

§ 55. Land Contracts as Evidence (Certified Copy).—The general rule in regard to proof of documents is that the original shall be produced unless required to remain in some public office. If it belongs in such office it can be proved by an exemplification of the records.³⁴ This general rule, however, has been modified by the statute in Michigan so that all conveyances and other instruments authorized by law to be filed or recorded and which shall be acknowledged and proved according to law, a duly certified copy of such instruments may be read in evidence in any court without further proof. Under this section of the statute, regardless of whether or not the original of the contract may be in possession of the party offering such certified copy, such copy is nevertheless admissible in evidence under the provisions of the statutes.³⁵

30. *Healey v. Worth*, 35 Mich. 166.

31. *Aultman Miller & Co.*, *Supra*.

32. *Mier v. Hadden*, 148 Mich. 492.

33. *Lumbering Company v. Powell*, 120 Mich. 58.

34. *Bradley v. Silsbee*, 33 Mich. 330; *Brown v. Cady*, 11 Mich. 537.

35. All conveyances and other instruments authorized by law to be filed or recorded and which shall be acknowledged or proved accord-

ing to law, and if the same shall have been filed or recorded, the record of a transcript of the record, or a copy of the instrument on file certified by the officer in whose office the same may have been filed or recorded, may be read in evidence in any court within this state without further proof thereof; but the effect of such evidence may be rebutted by other competent testimony. C. L. 1915 (12508).

§ 56. **Discharging Land Contracts of Record.**—When the vendor in a land contract has ceased by law to be bound by the provisions of the contract and is entitled to a release therefrom, the vendee named in said contract shall upon request by such vendor execute a discharge of the contract in the same manner as now provided by law for the discharge of mortgages and for a refusal to so discharge the same he shall be subject to a penalty in the sum of One Hundred (\$100) Dollars and also for whatever actual damages are occasioned by his neglect and refusal to provide such discharge.³⁶

36. When the vendor named in said contract has ceased in law to be bound by the provisions of the contract, and is entitled to a release therefrom, the vendee named in said contract, his heirs or assigns shall, when requested by said vendor, execute a discharge of said contract in the same manner as now provided by law for the discharge (discharging) of mortgages, and for a refusal to so discharge the same he shall be subject to the same penalties as are now provided by law for a refusal to discharge a mortgage after the same has been fully paid, and the party entitled to have said contract discharged from the records may proceed to enforce the discharge of the same as provided in section forty-five of chapter one hundred and fifty of the Compiled Laws of eighteen hundred and seventy-one for enforcing the discharge of mortgages, and the petition or bill asking for said discharge shall contain all the material averments regarding the subject matter thereof required by said section in regard to mortgages, so far as the same are applicable to contracts for the sale of lands. Provided, however, that no contract for the sale of lands shall

be deemed invalid for want of acknowledgment or recording. C. L. 11774, 1915.

The people of the State of Michigan enact that whenever any executor, administrator or guardian, appointed by any probate court of this state shall have executed any instrument in writing, purporting to be an assignment, release or discharge of any mortgage, or other evidence of a lien upon any personal or real property situate in this State, the probate judge of said court, or the register or clerk thereof, shall, when so requested, make and attach to such instrument a certificate under his hand and seal of said court, certifying the date of issuance of letters of testamentary, of administration or guardianship, as the case may be, to such executor, administrator or guardian, and the time to which they have continued in force unsuspended and unrevoked and such certificate shall be entitled to record in the office of the register of deeds, or other place of record, in any county in this state, with said instrument when the latter is entitled by law to be so recorded; and such record, or a duly certified copy thereof, shall be prima facie evidence of the facts therein

§ 57. Registration of Land Contracts Where Land Affected Lies in Two or More Counties.—It sometimes happens that the real estate sold under a land contract lies in several counties, and it therefore becomes desirable to record the instrument in each of such counties in order that it may be notice to innocent parties of the vendee's rights in such real estate. Where the instrument has been recorded in one county and in transmission or otherwise becomes lost, the statute provides a method³⁷ of registration in the other counties in such a case; the party interested may apply to the probate judge of the county where the real estate is situated and set up by verified

certified in all courts and legal proceedings in this state. C. L. 11775, 1915.

37. In all cases where a deed, mortgage, or other instrument affecting the title to real estate, shall have been or shall be executed, affecting land in two or more counties, and when the same shall have been duly recorded in the office of the register of deeds in any county in which any part of the lands to be affected thereby is situate, and such instrument shall have been lost or destroyed before being recorded in other counties, in which land affected thereby shall be situate it shall be lawful for any party or parties interested in such lost deed or other writing, or in the real estate the title to which shall be affected thereby, to apply to the judge of the probate court of the county where such real estate may be situate in which the record shall not have been made, for an order to record a duly certified transcript of such deed, mortgage, or other instrument, in such county, and thereupon such judge of probate shall give notice by publication, in accordance with the practice of such court, for

three successive weeks, of such application, and of the time and place, when and where a hearing will be had thereon, and on such hearing, if it shall appear to such probate judge that such deed, mortgage or other instrument was duly executed and has been legally recorded in any county in this state, and that the same was lost or destroyed before being recorded in other counties in which real estate to be affected thereby was situate, such probate judge shall make an order authorizing a certified transcript of such deed, mortgage, or other writing to be recorded in said county, and shall annex a duly certified copy of such order to such copy of such deed, mortgage, or other instrument, and thereupon such certified copy of deed, mortgage, or other instrument, and such order authorizing a record thereof, may be recorded in the office of the register of deeds of the county in which such order shall be made, and such record shall have the same force and effect as the record of the original would have had, had the same been recorded before being lost or destroyed.

Sec. 11766, Compiled Laws 1915.

petition the fact that such instrument had been executed and lost. A prayer should be made for an order to be entered authorizing the registration of a certified copy of such instrument.

Upon the filing of such petition, it becomes the duty of the court to make an order requiring three weeks' notice of hearing of such petition by publication and after such publication shall have been made, the court, if upon the hearing is satisfied of the execution of such instrument, it becomes his duty to make an order authorizing the registration of such transcript of said instrument.

§ 58. Possession by Vendee as Constructive Notice of Contract.—Possession of land by a contract purchaser is constructive notice of his rights and one who purchases such land from the grantor is chargeable with the notice of the rights of such occupancy and such possession may be either by person occupancy on the part of the vendee or through his tenant. The effect is the same, possession by tenant is deemed to be possession of the landlord.³⁹

§ 59. The Specific Tax on Land Contracts.—By statute⁴⁰ a specific tax of fifty cents per each One Hundred (\$100) Dol-

39. *Corey v. Smalley*, 107 Mich. 257; *Atkinson v. Akins*, 197 Mich. 297; *Woodward v. Clark*, 15 Mich. 104; *Russell v. Sweezey*, 22 Mich. 235; *Farwell v. Johnston*, 34 Mich. 342; *Dunks v. Fuller*, 32 Mich., 242; *McKee v. Wilcox*, 11 Mich., 358; *Allen v. Cadwell*, 55 Mich. 8; *Hommel v. Devinney*, 39 Mich., 523; *Seager v. Cooley*, 44 Mich. 14; *Weisberger v. Wisner*, 55 Mich. 518; *Michie v. Ellair*, 54 Mich. 518; *Stevens v. Castel*, 63 Mich. 111; *Moore v. Kenockee tp.*, 75 Mich. 332; *Schweiss v. Woodruff*, 73 Mich. 473; *Lambert v. Weber*, 83 Mich. 395.

40. See *Compiled Laws*, Sec. 4268. For the purpose of this act all indebtedness secured by liens upon

real property shall constitute that class of credit upon which this act imposes a specific tax. The word "Mortgage" as used herein shall include every mortgage or other instrument by which a lien is created over or imposed upon real property, notwithstanding it may also be a lien upon other property, or there may be other security for the debt, and shall also include executory contracts for the sale of real property, and deeds or other instruments that are given to secure debts. *Compiled Laws*, Sec. 4269. A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of the principal debt or obligation which is, or under any contingency

lars and major fraction thereof, of the unpaid purchase price is imposed on land contracts, and before the instrument is entitled to registration the county treasurer must certify that such tax has been paid. This tax is in lieu of all other general taxes, including city assessments.⁴¹

Unless this tax is paid, the land contract is not admissible

may be, secured by a mortgage upon real property situated within this state recorded on or after the first day of January, nineteen hundred twelve, is hereby imposed on each such mortgage, and shall be collected and paid as hereinafter provided; provided, that no tax shall be imposed upon any debt or obligation which is, or under any contingency may be, secured by a mortgage upon such real estate of charitable, educational and scientific institutions, incorporated under the laws of this state, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated; provided, that such exemption shall not apply to fraternal or secret societies, but all charitable homes of such societies shall be exempt; provided further, that no tax shall be imposed upon any debt or obligation which is, or under any contingency may be, secured by a mortgage upon any house of public worship with the land on which it stands, the furniture therein and all rights in the pews, and upon any parsonage owned by any religious society of this state and occupied as such; which such mortgage is recorded on or after the first day of January, nineteen hundred and twelve. Provided, further no tax shall be imposed upon any building and loan mortgage.

The tax imposed by this section shall be in addition to the recording fee now provided by law. Compiled Laws, Sec. 4275. No mortgage or land contract, which is subject to the tax imposed by this act shall be released, enforced, discharged of record or received in evidence in any action or proceeding at law or in equity, nor shall any assignment of or agreement extending any such mortgage or land contract be recorded until the tax imposed thereon by this act shall have been paid as in this act provided. No judgment or final order in any action or proceeding at law or in equity shall be made for the foreclosure or enforcement of any such mortgage or land contract, which is subject to the tax imposed by this act, or any debt or obligation secured thereby, until the tax imposed by this act shall have been paid as provided in this act. The certificate of the county treasurer in form as hereinafter provided, shall be prima facie evidence of the payment of the tax.

41. Union Trust Co. v. Detroit Common Council, 170 Mich. 692. The above act is constitutional. Union Trust Co. v. Detroit Common Council, *Supra*. For construction of the Act see Economy Power Co. v. Daskam, 74 Mich. 402-404; Union Trust Co. v. Rodford, 176 Mich. 50. Assurance Co. v. Detroit Common Council, 176 Mich. 80.

in evidence in any court of the state. This act has been held constitutional.⁴²

As to payment of the tax, it has been held that such tax may be paid at any time prior to the trial of the case or even after the trial has been entered upon.⁴³

A further question in connection with the specific tax which has been before the court and not decided is whether or not a forfeiture of a land contract can be legally declared before the payment of the specific tax. The last time this question was presented to the Supreme Court, they rested their decision on other grounds without deciding this proposition.⁴⁴

§ 60. Basis of Computing Specific Tax on Land Contracts.—Under Section 4268 et seq., of the Compiled Laws of Michigan, 1915, providing that no land contract can be offered in evidence until the specific tax is paid to the county treasurer as provided in the act, the county treasurer is to be guided by the face of the instrument, and where the instrument fails to show the first payment to have been made before the execution of the contract, the tax must be paid on the full consideration stated therein.⁴⁵

Where the instrument shows that the downpayment was paid before the execution of the contract, the amount thereof should be deducted from the purchase price, and the tax computed on the balance.⁴⁶

§ 61. Sale of Expectant Interests.—The law looks with disfavor upon the sale of expectant interests in real estate, and before such a contract can be enforced it must be alleged and proven that there was neither fraud nor oppression, and that the ancestor had knowledge of such contract and had acquiesced therein. The fact that the ancestor is insane and is incapable of consenting to the contract constitutes no exception to the rule that in such cases where the ancestor is under a

42. See *Union Trust Co. v. Detroit Common Council*, supra.

43. *Krell v. Cohen*, 214 Mich. 590; *Nelson v. Breitenwischer*, 194 30; *Rodenhouse v. Degolio*, 198 Mich. 402.

44. *Krell v. Cohen*, supra.

45. *Detroit Land Contract Co. v. Green*, 202 Mich. 464.

46. *Shupert v. Ingham County Treasurer*, 214 Mich. 333.

disability, so that his consent cannot be obtained, the sale of such expectant interests will not be specifically enforced or performed.⁴⁷

§ 62. Vendor's Equitable Lien for Unpaid Purchase Price.—It is well settled that where the vendor of real estate takes no security for the payment of the purchase price he has an equitable lien for such purchase money upon the land so sold.⁴⁸ This lien attaches notwithstanding the fact that the sale did not convey a title in fee or a legal title, but only an equitable right or interest.⁴⁹ Such a lien is assignable and may be enforced against the land even though the statute of limitations has run against the personal liability of the vendee.⁵⁰

§ 62A. Mechanic's Lien—On Interests of Vendee.—It is provided by statute that a vendee shall have the power to incum-

47. *Stevens v. Stevens*, 181 Mich. 438 and 449.

48. *Case of Lavin v. Lynch*, 203 Mich. 145.

49. *Lavin v. Lynch*, supra; *Ortmann v. Plummer*, 52 Mich. 76; *Warren v. Fenn*, 28 Barb. (N. Y.), 333; *Bledsoe v. Games*, 30 Mo. 448; *Loomis v. Railroad Co.*, 17 Fed. 301; *Curtis v. Buckley*, 14 Kan. 449; *Board v. Wilson*, 34 W. Va. 609 (12 S. E. 778).

In the case of *Ortmann v. Plummer*, supra, Mr. Justice Campbell said: "The right of a vendor to a lien does not seem to be confined to the sale of a legal title or title in fee. The leading case of *Mackreth v. Symmons*, 15 Ves. 329 (1 Leading Cases in Equity, 194, and notes), was one relating to what was treated as an equitable title. The doctrine has been applied to copyholds, and appears to be received as to all recognized title. See *Adams' Eq.* (7th Ed.) p. 128, and notes; *Winter v. Lord Anson*, 3 Russ. 488. The lien on an equitable

title may no doubt be more uncertain, by reason of the danger that bona fide purchasers from the legal holder may intervene and destroy it. But subject to that risk (which is not confined to equitable estates) it may be upheld. In the present case the legal title is still in the railway company, having knowledge of the equities, and defendants are not bona fide purchasers. We see no difficulty in the nature of the title."

50. *Lavin v. Lynch*, supra; *Stringer v. Gamble*, 155 Mich. 295.

Bartlett v. Bartlett, 103 Mich. 293. In a summary proceeding to recover possession of lands instituted by the holder of the legal title, it was held that the defendant cannot set up as defense a verbal agreement made by him with the owner for the purchase of the land coupled with evidence of part performance on his part; his remedy if he has any being in equity.

Pomeroy's Equity Jurisprudence, Section 2240, Volume 5.

ber his equitable interest in the real estate in the same manner as the actual holder of the legal title,⁵¹ and if the land contract for the property covered by the lien is forfeited or surrendered by the vendee during the life of the lien, the lien holder shall be subrogated to the rights of the vendee as they existed before forfeiture.

51. "Any person furnishing services or materials for the erection of a new building or structure upon land to which the person contracting for such erection has no legal title, shall have a lien therefor upon such (building) buildings or structure; and the forfeiture or surrender of any title or claim of title held by such contracting person to such land shall not defeat the lien upon such building or structure of such person furnishing services or materials as aforesaid. In case the property covered by the lien is held by the vendee in a land contract, and he surrenders or forfeits his

rights thereunder, the person or persons holding such liens may be subrogated to the rights of such vendee, as his rights existed immediately before such surrender or forfeiture, by performing the covenants contained in such contract within thirty days after such forfeiture or surrender is made."

Compiled Laws, 1915, Sec. 14798.

Where the contract purchaser of land constructs a building thereon, the lien does not attach to the entire land, but only to the building.

Fuller v. Loan & Bldg. Assn., 110 Mich. 73; Sheldon Kamm & Co. v. Bremer, 166 Mich. 579.

CHAPTER V

CORRECTING DEFECTS IN THE TITLE MARKETABLE TITLES

TITLE BY ADVERSE POSSESSION ADVERSE POSSESSION OF VACANT, WILD AND UNOCCUPIED LAND

REMEDYING DEFECTS IN THE TITLE BY AFFIDAVIT DISCHARGING ANCIENT MORTGAGES THE ACTION TO QUIET TITLE PLEADING, PRACTICE AND FORMS

- § 63. Marketable Titles—Terminology.
- § 64. Clouds on the Title—Definition.
- § 65. Discharge of Mortgages of Record by Petition.
- § 66. Defects of Record, Remediable Affidavits—Forms.
- § 67. Form of Petition for Discharge of Mortgage.
- § 68. Form of Certificate Discharging Mortgage.
- § 69. Defects in Title Curable by Affidavits.
- § 70. Title by Adverse Possession.
- § 71. Adverse Possession When Five-Year Period Sufficient to Vest Title.
- § 72. Adverse Possession by One Co-Tenant Against Another.
- § 73. Adverse Possession Vendee Against Vendor.
- § 74. Adverse Possession of Vacant, Wild and Unoccupied Land.
- § 75. Adverse Possession Against the State.
- § 76. Tacking Successive Possession.
- § 77. Titles Held to Be Defective—Michigan Decisions.
- § 78. Defective Titles—Decisions from Other States.

Introductory Statement.—In every sale of real estate the question as to whether or not the vendor's title is marketable is likely to arise. Sometimes the vendor holds title by adverse possession; again there are certain clouds and defects in the title about which there may be serious question as to whether the title is or is not marketable. The close connection which this subject bears to the subject of land contracts generally has impelled the author to include in this treatise a discussion of the subjects included in this chapter.

§ 63. **Marketable Titles—Terminology.**—A land contract, whether preliminary in character or otherwise, usually re-

quires the vendor to furnish a marketable title to the property he seeks to sell. Some contracts employ the term "merchantable" instead of "marketable." In other instances one or more of the terms "good," "complete," "perfect," "valid," or "clear title," are used. Again the contract may require the vendor to furnish an abstract of title showing a good title or any other of the above mentioned descriptive terms, of record or may require the vendor to furnish an abstract disclosing such title. A contract to furnish a good title as shown by the abstract of record is a much different covenant than one merely requiring a vendor to furnish a good title.

We shall now consider the legal effect of these various terms when used in a contract for the sale of land.

(a) Marketable or Merchantable Title. The courts have held these terms are synonymous.¹ A title to real estate is merchantable or marketable in the vendor when the same is free from all reasonable doubt² and a title is held to be subject to a reasonable doubt if the facts disclosed in relation thereto would raise a suspicion in the minds of reasonable men as to the validity of the title.³ Some courts have defined a doubtful title to be such a material defect in the title to land as will cause just apprehension and a reasonable doubt in the mind of a reasonably prudent and intelligent person acting on competent legal advice that will prompt him to refuse to take the land for that reason.⁴

1. *Bradway v. Miller*, 200 Mich. 648.

2. *Gates on Real Property* Sec. 606; *Thompson's Title to Real Estate*, Sec. 77; *Sugden on Vendors*, page 584; *Bradway v. Miller*, 200 Mich. 648.

3. *Bradway v. Miller*, 200 Mich. 648-655; *Lake Erie Land Co. v. Chilinski*, 197 Mich. 314; *Ogooshevitz v. Arnold*, 197 Mich. 203.

4. "Counsel insists that one may have a merchantable title, even though the abstract does not show it, and urges that this contract calls for an abstract showing a mer-

chantable title, and that the abstracts do not show it. The distinction must be recognized. This court and other courts have recognized it. If an abstract does not on its face show a merchantable title, and it requires parol proof to establish the fact that the title is a merchantable one, a contract agreeing to furnish an abstract showing a merchantable title is not complied with. The abstract itself must furnish the evidence that the title is merchantable." *Lake Erie Land Co. v. Chilinski*, 197 Mich. 222.

(b) Marketable Titles of Record. Contracts for the sale of lands frequently contain a provision that the vendor shall furnish an abstract of title showing a merchantable title of record, or "as shown by the abstract," it is lawful and competent for parties to enter into such agreements, and when they do, the abstract itself must disclose a merchantable title, and a title by adverse possession not shown of record will not be sufficient.⁵ There is no statute authorizing the placing of affidavits on record to show that the vendor has held possession of the property adversely for the length of time required by the statute of limitations, the statute on this subject being limited to other defects in the title.⁶

Where the contract simply requires the vendor to furnish a good title, or a valid title, then a title derived by adverse possession is a sufficient compliance with the contract.⁷

(c) Contract Silent as to Sort of Title. Where the contract is silent as to the sort of title vendor shall furnish, he is nevertheless bound to furnish a marketable title although not necessarily a marketable title of record.⁸

5. *Bradway v. Miller* supra; Compiled Laws 1915, 11736-11738.

Permitting registration of affidavits for purpose of establishing facts in relation to chain of title and make such registered affidavits prima facie evidence of the facts therein cited.

Said the court in *Bradway v. Miller*, supra: "Such affidavits may and often do merely point to evidence which would if not disputed support a decree quieting the title."

6. *Gates on Real Property*, Sec. 606.

Barnard v. Brown, 112 Mich. 452—in which the court used the following language:

"A purchaser under a land contract which requires the vendor to execute and deliver a good and sufficient warranty deed of land, 'so as to convey the same in fee, and

unencumbered' is entitled merely to a good and marketable title and he cannot demand a title perfect upon the record."

"A marketable title is one which is free from encumbrance, and which is of a character to assure to the vendee the quiet and peaceable enjoyment of the property."

"A title by adverse possession is a marketable title."

7. *Dwight v. Cutler*, 3 Mich. 567. Holding that where an oral agreement to purchase land was performed by the purchaser and was silent as to the sort of title to be furnished, the vendee was entitled to a marketable title and was justified in refusing a deed which did not contain the usual covenants of warranty.

8. *Dikeman v. Arnold*, 71 Mich. 656, 40 N. W. Holding that a

§ 64. **Clouds on the Title—Definition.**—A cloud on the title is an outstanding claim or encumbrance which if valid would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question.⁹

The cloud upon the title must constitute an apparent encumbrance upon it, or an apparent defect in it, and something that shows *prima facie* some right of a third party either to the whole or some interest in it.¹⁰

Any instrument which shows by its terms to be a conveyance from the original source of title to an adverse claimant creates a cloud upon title, if extrinsic evidence is needed to show the invalidity of the instrument.¹¹

Another title of a nature rendering it questionable whether it is not *prima facie* a better title than that of plaintiff constitutes a cloud on his title.¹²

A cloud, such as equity will undertake to remove, is the semblance of a title, or the claim of an interest in lands appearing in some legal form, but which is in fact unfounded, and which it would be inequitable to enforce.¹³

Where the owner of cutting stone rights claimed the right to have tracks out on the land, to be used for shipment of his freight, is the claim of an easement in the land and a cloud on the title of its owner.¹⁴

The owner of property whose title is clouded by the recording of an instrument may maintain a suit to have the record

vendor has an undoubted right to a good title and to a deed with proper covenant of warranty.

See also the following decisions supporting the text: *Develan v. Duncan*, 49 N. Y. 485; *Jefferies v. Jefferies*, 117 Mass. 184; *Middleton v. Thompson*, 163 Pa. 112; *Hamlin v. Schulte*, 34 Minn. 447; *Pett v. Sherwood*, 43 Minn. 447; *Gauthier v. West*, 45 Minn. 192; *Davis v. Henderson*, 17 Wis. 103.

9. 11 C. J. 920.

10. *Whitney v. Port Huron*, 83 Mich. 268; *Detroit v. Martin*, 34 Mich. 170.

11. *Stoddard v. Prescott*, 58 Mich. 542.

12. *Eaton v. Trowbridge*, 38 Mich. 454.

13. *Head v. Fordyce*, 17 Cal. 149.

14. *Oman v. Bedford*, 134 Fed. 64.

cancelled although the instrument was not entitled to go on record.¹⁵

A deed executed by a married woman, without being acknowledged by her in the manner prescribed by law constitutes a cloud on the title which equity will take cognizance of.¹⁶

Where it is necessary to have legal acumen to discover the defect in a deed, it constitutes a cloud on title which a court of equity will remove.¹⁷

A deed by one who has only a contingent remainder, which afterwards became extinct, cast a cloud upon the title.¹⁸

An outstanding lease constitutes a cloud on the title, where, although originally valid, proof of extrinsic evidence must be introduced to show that it has become *functus officio* by reason of a violation of its condition.¹⁹

A certificate of sale of land under execution will be removed as a cloud on title, where it is *prima facie* valid.²⁰

When a tax is made a lien on the premises assessed, if illegal, it constitutes a cloud which equity will remove.²¹

Where a judgment creditor who had caused the equitable interest of his debtor in land to be sold on execution, neglected for over a year to take proceedings to ascertain the interest of the debtor a bill was sustained to vacate the levy and sale,²² and such a bill may be maintained by the legal owner.²³

§ 65. Discharge of Mortgages of Record by Petition.—In cases where the title to real estate is clouded by long standing mortgages which have either been paid or more than 15 years have elapsed since the last payment was made on the debt secured by the mortgage, and no suit or proceeding has been commenced to foreclosure such mortgage, the statute²⁴ affords a

15. *Walter v. Hartwig*, 106 Ind. 123; 6 N. E. 5.

16. *Brooks v. Kearns*, 86 Ill. 547

17. *Merchants Bank v. Evans*, 51 Mo. 335.

18. *Dickerson v. Dickerson* (Mo.), 110 S. W. 760.

19. *Pendhill v. Union Min. Co.*, 64 Mich. 172.

20. *Woodworth v. Garton*, 46 Mich. 324.

21. *Frost v. Leatherman*, 55 Mich. 33; *Thomas v. Cain*, 35 Mich. 155; *Scofield v. Lansing*, 17 Mich. 437.

22. *Gordon v. Twp. of Burleigh*, 153 Mich. 493; *Krenze v. Soloman*, 126 Mich. 290.

23. *Edsell v. Nevins*, 80 Mich. 146.

24. There are two statutes authorizing proceedings of this character. Sec. 12715 Compiled Laws 1915, which it is believed supersedes

Sec. 11746 Compiled Laws. Both sections are identical. Sec. 12715 reads as follows:

"When a recorded mortgage on lands or property has been paid and satisfied, or when fifteen years have elapsed since the debt secured by such mortgage became due and payable, or since the last payment made thereon, and no suit or proceedings have been commenced to collect the same, the owner of such land or property may present a petition to the Circuit Court for the county in which such land or property so encumbered is wholly or in part situated, duly verified by the oath of the petitioner, or by some one in his behalf, which shall state the names of the mortgagor and mortgagee, the date of the mortgage, and the liber and page of the record thereof, the facts in regard to payment of the debt thereby secured, or the non-commencement of such suit or proceeding within said fifteen years, and further that the present residence or whereabouts of the mortgagee (or his assignee, if the mortgage shall have been assigned), is unknown to the petitioner and that the petitioner has been unable to ascertain the same after diligent search and inquiry; or, if such be the fact, that the mortgagee or assignee is deceased, and that three months have elapsed since his death, and that the names and residence of the legal representative, if any there are, of the mortgagee or assignee, are unknown to the petitioner, and the he was unable to ascertain the same after diligent search and inquiry; or when such mortgagee is a trustee merely and without interest therein, that he does not reside in

the State of Michigan or is dead; and such petition shall conclude with a prayer that an order of the court may be made discharging said mortgage and declaring it fully paid and satisfied. Upon the presentation of such petition, said court may proceed to hear and determine the truth of the matters therein stated, and if it shall be made satisfactorily to appear to the court, either by the production in evidence of the original mortgage or of the bond or bonds or promissory notes, to secure the payment of which such mortgage was given, or by any other competent evidence, that the debt secured by such mortgage has been fully paid, both principal and interest thereof; or if it shall be made to appear to the court by competent evidence that said mortgaged debt has been past due for 15 years, or that 15 years have elapsed since the last payment was made on such debt, and that no suit or proceeding has been commenced to foreclose such mortgage, the court shall make a certificate to that effect setting forth therein the names of the witnesses and the nature of the evidence by which such facts have been made to appear, and a minute thereof shall be entered in the journal of said court, and such certificate signed by the judge of said court and attested by the clerk thereof under the seal of said court, shall be delivered to the said petitioner and may be recorded in the office of the register of deeds for the county or counties in which such mortgage shall be of record, in like manner and with like effect in all respects as if it were a formal discharge of said mortgage duly executed by the mortgagee.

convenient and inexpensive method of discharging such liens of record. In such cases the owner of the land may file a petition to the Circuit Court of the judicial district where the mortgage is registered, setting up such facts under oath. The essentials of the petition are:

(a) It must be made by the owner of such land.

(b) It must be verified by such owner or some one in his behalf.

(c) It shall state the names of the mortgagor and mortgagee, date of the mortgage, liber and page of the record thereof where recorded, the facts in regard to the payment of the debt secured or the non-commencement of such suit or proceeding within fifteen years.

(d) That the present residence or whereabouts of the mortgagee or his assigns, if the mortgage shall have been assigned, is unknown to the petitioner and that the petitioner has been unable to ascertain same after diligent search and inquiry, or if such be the fact, that the mortgagee or assignee is deceased, and that three months have elapsed since his death, and that the names and residences of the legal representatives, if any there are, of the mortgagee or assignee, are unknown to the petitioner, and that he has been unable to ascertain same after diligent search and inquiry.

(e) Such petition shall conclude with a prayer that an order of the court may be made discharging such mortgage, and declaring it fully paid and satisfied.

Upon the presentation of such petition, the court may proceed to hear and determine the truth of the matters therein stated without any notice or any process of any kind.

Evidence Required to Discharge the Mortgage. If the petitioner is able to produce in evidence the original mortgage or bond, or promissory notes to secure the payment of which the mortgage was given, he should do so, or any other competent evidence that payment has been made will be received by the court. If the petitioner is unable to show that the mortgage has been paid, it will be sufficient to establish that said mortgage debt has been due for 15 years or that 15 years have elapsed since the last payment was made on such debt, and that no suit or proceeding has been made to foreclose such mortgage.

(b) (If the affidavit is sought to cure defects arising from the use of initials, misspelled or abbreviated names, in the place of paragraph A substitute as follows:)

That the true and correct name of the said vendor in such conveyance was Richard Roe, but that the said Richard Roe throughout his lifetime was commonly called Dick Roe, and to the personal knowledge of this deponent, on many occasions executed contracts, deeds, and other instruments signing his name thereto as Dick Roe, but that the said Dick Roe who executed said conveyance as vendor was the same identical person as Richard Roe who was the owner of such property of record on the date such conveyance was made.

(c) (Where a deed conveys property to a husband and wife as vendees followed by conveyance from only one, one of such vendees having died in the meantime without anything appearing of record to show this fact.)

Substitute the following clause for clause (a):

That since the said Richard Roe, and Mary Roe, his wife, acquired title to the above described property, to-wit: on the day of.....the said Mary Roe died at the City of.....County of....., and that by reason of the death of Mary Roe, the title to said real estate vested individually in Richard Roe, her husband.

§ 67. Form of Petition for Discharge of Mortgage.—State of Michigan, in the Circuit Court for the County of.....

In the matter of the Petition of
John Doe for the Discharge of a
Certain Mortgage of Record. }

To the Circuit Court for the County of.....

Your petitioner, John Doe, respectfully shows unto this Honorable Court as follows:

1. That your petitioner is the owner of the following described real estate: (here insert complete legal description of the real estate).

2. That on the.....day of....., one John Jones was the owner of the above described property, and that on said date, he, and his said wife, Mary Jones, made and executed

to William Smith, their certain mortgage for the sum of \$.....upon said property, which said mortgage was on the.....day of.....recorded in liber.....of mortgages of the register of deeds of.....county, page.....which said mortgage is undischarged of record.

3. That more than 15 years have elapsed since said mortgage became due and payable and the last payment was made thereon and that no suit or proceedings have been commenced to foreclose such mortgage.

4. That the present residence or whereabouts of the mortgagee of said mortgage is unknown to your petitioner and that your petitioner has been unable to ascertain the same, after diligent search and inquiry.

WHEREFORE your petitioner prays that an order of the court may be made discharging the said mortgage and declaring it fully paid and satisfied in accordance with Section 12715 of the Compiled Laws of the State of Michigan.

State of Michigan, }
County of Wayne, } ss.

John Doe, being first duly sworn, deposes and states that he has read the foregoing petition by him subscribed and that the same is true of his own knowledge, except as to the matters therein stated to be upon information, and belief, and as to those matters he believes it to be true.

Notary Public, Wayne County, Mich.

My commission expires.....

§ 68. Form of Certificate Discharging Mortgage.—State of Michigan, in the Circuit Court for the County of.....

In the matter of the Petition of }
John Doe for the Discharge of a }
certain Mortgage of Record. }

At a session of said court held in the.....county building on the.....day of....., A. D.

Present: Honorable.....Circuit Judge.

This cause having been brought on to be heard upon the petition of John Doe filed herein praying for the discharge of a

certain mortgage made and executed by John Doe and Mary Doe, his wife, to.....on the day of.....
 recorded in liber.....of mortgages on page.....
 and the court having heard the evidence and the arguments of counsel, does by these presents hereby certify:

1st. That it satisfactorily appears to this court by the testimony of such petitioner produced in said cause, that he is the owner of the property described in and covered by said mortgage.

2nd. That said mortgage is undischarged of record and more than 15 years have passed since said mortgage debt was due and that more than 15 years have elapsed since the last payment was made upon said debt, and that no suit or proceeding has been commenced to foreclose said mortgage, and that under and by virtue of section 12715 of the Compiled Laws of the State of Michigan of 1915, said petitioner is entitled to have said mortgage satisfied and discharged of record, and that the same is hereby satisfied and discharged of record.

3rd. That this certificate may be recorded in the office of the register of deeds of.....county in like manner and with like effect in all respects as if it were a formal discharge of said mortgage duly executed by the mortgagee above named.

.....
 Circuit Judge.

Attest:

.....
 Clerk of the.....Circuit Court.

§ 69. Defects in Title Curable by Affidavits.—Where the defect in the chain of title relates to the date of birth of some heir, the question as to whether or not a vendor was married on the date of a given conveyance, the question as to whether an individual is living or dead, the identity of names or the residence of parties or the relationship of such parties named in deeds, wills, mortgages, and other instruments affecting real estate affidavits may be executed and recorded by those showing knowledge of the facts, which affidavits may, in many

cases, serve to cure the defect in the record. There is no statute, however, authorizing the registration of affidavits setting up the fact of adverse possession, and the usual and only satisfactory way of establishing title of record by adverse possession is through an action to quiet title.²⁵ While the statute does not permit the registration of affidavits respecting the adverse possession of property, if the averments in the affidavit relate only to the question of adverse possession, nevertheless it is quite a common practice for members of the profession to draft an affidavit correcting some defect in the chain of title relating to the date of birth of some heir, the marital status of a particular vendor, and in such an affidavit which the statute permits to be recorded, the necessary averments are included relating to the adverse possession of the property. In this way, the fact of adverse possession can be placed on the record.

§ 70. Title by Adverse Possession.—While it is well settled that where the contract does not specifically require the vendor to furnish a marketable title of record or as shown by the abstract, a title by adverse possession is sufficient.²⁶ Neverthe-

25. Compiled Laws of Michigan, 1915, Sec. 11736 to 11738 inclusive:

Affidavits as to the birth, marriage death, name, residence, identity, and relationship of parties named in deeds, wills, mortgages and other instruments affecting real estate may be recorded in the office of the register of deeds of the county where said real estate is situate.

It shall be the duty of the register of deeds for the county where such affidavit is offered for record to receive the same and cause the same to be recorded in the same manner that deeds are recorded. The register of deeds shall collect the same fees for recording such affidavit as are provided by law for recording deeds.

Such affidavits, whether recorded before or after the passage of this act, may be received in evidence in any civil cause, in all courts of this state and by all boards or officers of the state in all suits or proceedings affecting such real estate and shall be prima facie evidence of the facts and circumstances therein contained.

26. Dupont v. Starring, 42 Mich. 492; Bunce v. Bidwell, 43 Mich. 542; Bernard v. Brown, 112 Mich. 455.

In O'Connor v. Higgins, 113 N. Y. 521, after describing the features of adverse possession shown by the plaintiff, the court said:

"There is no proof nor pretense of any other title to the property, lying either in grant or in claim;

less, such a title should be accepted by the vendee with a great deal of caution, as by statute, it is provided that a minor, an innocent person, or one imprisoned or any person claiming under or through persons under such legal disabilities aforesaid, have five years in which to bring an action for the recovery of real estate after such legal disabilities have been removed. Another section of the statute²⁷ provides that if

nor does anything appear to disturb the conclusiveness of the presumption of a valid grant which arises from an exclusive and uninterrupted possession of the property under a claim of title founded on a conveyance, for a period extending far beyond the length of time mentioned in the statute of limitations. Such a presumption will always displace objections based on flaws in the proceedings in which the title has had its source, and protect the title from being injured or affected by their disclosure."

In *Forman v. Wolf*, 29 Alt. 837, the Supreme Court of Maryland says:

"It appears from the record that the appellee has been in the exclusive possession of the property in dispute for over 20 years, and, even if the objection urged by the appellant was tenable, the title of the appellee would be a good and marketable one by adverse possession, under the statute of limitations. It is well settled that a title by adverse possession for over 20 years, where the only persons who could claim were all under no disability, is marketable, and such as a court of equity will compel a purchaser to take."

In *Tewksbury v. Howard*, 138 Ind. 110, it was claimed that a title obtained by adverse possession is not

a marketable one. In answer to this, it was said by the court:

"The principal argument is that the decree quieting title came too late to support this suit, but incidentally it is said that a title by adverse possession is not a marketable title. If a marketable title, it is manifest that the decree so alleged was only in confirmation of the title so held and that the tardiness in procuring it would not defeat the action. Title by adverse possession is as high as any known to the law. * * * A marketable title cannot be said to be more."

In the case of *Elder v. McClaskey*, 17 C. C. A. 251, 70 Fed. 529, involved a title by adverse possession under the Ohio statute. Of that Mr. Justice Taft said:

"Under the construction put upon this statute by the Supreme Court of Ohio, an open, notorious, exclusive, and adverse possession of land for 21 years, with or without color of title, whether continuous in the first possessor or tolled in persons claiming under him, and whether with or without knowledge of the existence of a better title, confers upon the original possessor, or those claiming under him, an indefeasible title in fee"; citing *Paine v. Skinner*, 8 Ohio 159, and several other Ohio cases.

27. If at the time when any right of entry, or of action, as aforesaid,

the person under the legal disabilities aforesaid shall die during the continuance of the same without the rights of such person having been adjudicated, his heirs, or anyone claiming under him, shall have five years from the date of his death to bring such action even though the statute of limitations has expired.

Another principle which should be borne in mind in relation to titles by adverse possession is that actual possession by a tenant in common, will be presumed to be permissive and not adverse to that of his co-tenants.²⁸ Illustrative of the foregoing, it might happen that a vendor would occupy property for the full period of the statute of limitations, namely, 15 years, and it might still be possible for the rights of persons under such legal disabilities to be asserted against the property for many years thereafter. But see Footnote 29.

The writer recalls of one instance where a suit was brought to foreclose a mortgage and successfully maintained 41 years after the execution and registration of the mortgage where payments had been made and the instrument had thus been kept in force.

In another instance, tried before one of our lower courts, title was successfully asserted on behalf of a person under legal disability which had been occupied by the defendant for a period of 37 years.

shall first accrue or have accrued, the person entitled to such entry or action shall be or shall have been, within the age of twenty-one years, insane, or imprisoned such person, or any one claiming from, by or under him, may make such entry, or bring such action at any time within five years after such disability, shall be or shall have been removed, although the time limited therefor in the first section of this chapter may have expired. Compiled Laws 1915, Section 12315.

28. If the person first entitled to make such entry, or bring such action, shall die, or shall have died

during the continuance of any of the disabilities mentioned in the preceding section, and no determination or judgment shall have been had of, or upon the title, right or action, which accrued to him, the entry may be made, or action brought, by his heirs, or any one claiming under him, at any time within five years after his death, although the time limited therefor in the first section of this chapter may have expired. Compiled Laws 1915, Section 12316

29. *Corley v. Thompson*, 196 Mich 713.

These examples and many others which could be cited indicate the necessity on the part of the vendee of requiring convincing evidence before accepting a title grounded upon adverse possession, that no persons under legal disability are in position to assert claims against the property. The better practice where there is any doubt whatever involved would be to require the vendor to quiet the title before accepting same.

§ 71. Adverse Possession When Five-Year Period Sufficient to Vest Title.—In a certain class of cases by reason of a special statute of limitation, adverse possession of real estate for a period of five years, will vest in the occupant the title to the real estate. In such cases, the general statute of limitations has no application.³⁰ Those cases where the five-year statute applies are:

Where defendant claims title by or through some deed made upon a sale by—

- (a) An executor or administrator.
- (b) A guardian or testamentary trustee.
- (c) A sheriff or other ministerial officer under an order, judgment, or decree, or process of the court.
- (d) By sheriff upon a mortgage foreclosure sale.
- (e) Through a devise in a will which has been probated in this state for fifteen years, and no action has been brought in a court of chancery to set same aside within that time.

30. "Within five years, where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by an executor, administrator, guardian, or testamentary trustee, or by a sheriff, or other proper ministerial officer, under the order, judgment, decree or process of a court, or legal tribunal of competent jurisdiction within this state, or by a sheriff upon a mortgage foreclosure sale; nor through a devise in any will which shall have been probated in this state for fifteen years, during which period no suit in chancery has been brought to

test the validity of such devise: Provided that in cases where such fifteen-year period has already elapsed such rights of entry or actions shall be barred after two years from the passage hereof, or in case such right has not accrued, then after two years from the accruing thereof." Compiled Laws 1915, Section 12311.

Pence v. Miller, 140 Mich 205, holding that possession for five years under a void tax deed gives the purchaser title by adverse possession, the general statute of limitations having no application to such a case.

(f) By some officer of the state or of the United States authorized to make deeds upon the sale of land for taxes assessed and levied within this state, the limitation of the action for the recovery of the land is ten years instead of five years.³¹

Where the tax deed is void on its face, the five-year limitation will not apply, as it is then only a nullity. In order that the statute may control the deed must be *prima facie* evidence of title.³²

The statute was intended to compel parties who would contest judicial sales for irregularities or defects to do so within the period fixed by the statute, and it is only when the suit brings into question the validity of the sale and the title thereunder, that the statute has application.³³

Where the holder of a tax deed obtains possession illegally through the collusion with a tenant, the statute will not protect him.³⁴

In those cases whereby because of the relation of the parties it was the duty of the person who purchased the tax titles to pay the taxes, his possession will not be deemed to be adverse to the holder of the legal title.³⁵

§72. Adverse Possession by One Cotenant Against Another.—Frequently questions involving the adverse possession of real estate by one cotenant against another are presented to the legal profession. When the ancestor dies leaving several heirs-at-law, they become as to each other cotenants of the real estate left by such ancestor. The rule as laid down by the Michigan decisions on this question is as follows:

“The actual possession of a tenant in common will not be presumed as adverse to that of his cotenants, and his con-

31. “Within ten years, where the defendant claims title under a deed made by some officer of this state, or of the United States, authorized to make deeds upon the sale of lands for taxes assessed and levied within this state,” Compiled Laws 1915, Section 12311.

32. *Fitscher v. Olsen*, 155 Mich. 320, relating to tax deed. *McVicker*

v. Filer, 31 Mich. 304; *Tull v. Wright*, 37 Mich. 93.

33. *Donovan v. Word*, 100 Mich. 605; *Showers v. Robinson*, 43 Mich. 502.

34. *Williams v. Fox*, 152 Mich. 217.

35. *Marsh v. Breen Iron Co.*, 181 Mich. 222.

structive possession in like manner will be limited to his interest as tenant in common. The possession of one tenant in common, unless under a claim of exclusive right will not affect the rights of the cotenants. Such exclusive claims and denial of their rights should be clear and unambiguous and brought home to the knowledge of the cotenants either by express notice or by implication. And if the latter, all doubt growing out of the nature and character thereof should be against an ouster. The presumption should be that the tenant in possession respects and recognizes the rights of his cotenants, until the contrary clearly appears; that the possession is rightful, and not to the exclusion of others having equal rights." ³⁶

"The continuous possession of a cotenant may, however, be of such a hostile character as to convert it into an ouster."

One noted text writer has laid down the rule to be as follows:

"If one tenant in common has been in possession a great number of years, without any accounting to his fellow commoners, this is proper evidence from which the jury may infer an adverse possession. In some instances, such possession has been regarded as raising a presumption of law which the jury is not at liberty to resist. An exclusive possession under a claim of title for 40 years, while the other cotenants resided in the same county and failed to assert any claim to their property, warrants the presumption of an actual ouster." ³⁷

36. *Campau v. Campau*, 44 Mich. 31; *Corby v. Thompson*, 196 Mich. 706.

37. *Freeman Cotenancy & Partition*, Sec. 242. "Many of the authorities hold that an entry under a conveyance which purports to convey the entirety is equivalent to an express declaration on the part of the grantee that he enters claiming the whole to himself, and is such a disseizin as sets the statute in motion in favor of the grantee. *Freem. Coten.* No. 224; 11 *Am. & Eng. Enc. Law*, p. 1114. Other authorities hold that the statute does not be-

gin to run until the cotenant has had notice or knowledge of the ouster. 3 *Shars. & B. Lead. Cas. Real Prop.*, p. 121. But it is not necessary that actual notice be shown or brought home to the cotenant. It is said in *Packard v. Johnson*, 57 Cal. 180, that plaintiff was ousted from the point of time when he became aware of such claim, or (at the very least) from the time when, as a prudent man, reasonably attentive to his own interests, he ought to have known that his cotenant asserted an exclusive right to the land. Which-

§ 73. Adverse Possession Vendee Against Vendor.—Under the former rule in force a vendee could not acquire property adversely against the vendor, the court in one case stating,³⁸ "Such holding and occupancy could not in a hundred years ripen into an adverse holding and the complainant would be equitably estopped from so claiming."

This rule has now been modified, however, so that where the vendee claims to be the owner of said property, under the contract of purchase, and under and by virtue of said claim, occupies same adversely, for a period of twenty years after the last payment was due on such contract or after the last payment was made on such contract, he will be permitted to assert such title against his vendor.³⁹

§ 74. Adverse Possession of Vacant, Wild and Unoccupied Land.—The subject of adverse possession as applied to wild, vacant and unoccupied land is more difficult than as applied to occupied and improved lands. But the difference is in the nature of the acts required by law and the amount of evidence necessary to prove adverse possession. This is caused by the fact that in the case of unoccupied and unimproved lands, as can be plainly seen, it would require different acts and plainer

ever rule is adopted, the full statutory period has run against complainants, for it must be conceded that before the expiration of the 15 years a prudent man, reasonably attentive to his own interests, ought to have discovered that defendants' grantors had asserted an exclusive right to his parcel of land." *Fuller v. Swensberg*, 106 Mich. 305 (64 N. W. 463, 58 Am. St. Rep. 481); *Brigham v. Reau*, 139 Mich. 256 (102 N. W. 845); *Dubois v. Campau*, 28 Mich. 304.

38. *Jaspa v. Martin*, 161 Mich. 336, cited in *Rodgers v. Beckel*, 172 Mich. 530.

39. "In every action for the recovery of real estate or the possession thereof, the person establish-

ing the legal title to the premises shall be presumed to have been in possession thereof within the time limited by law for bringing such action, unless it shall appear that the same has been possessed adversely to such legal title by the defendant or by those from or under whom he claims, or that the grantee, or his assigns, in a contract of purchase have been in possession claiming title by virtue of said contract of purchase for a period of twenty years after the last payment was due on said contract or after the last payment was made on said contract. The provisions of this section shall not apply to any contract of purchase which is now the subject of litigation." *Compiled Laws 1915, Sec. 12314.*

evidence of the same in order to sufficiently apprise the real owner of such claim of adverse possession. In the case of occupied and improved lands, the actual residence of the claimant and the improvements made by him during the statutory period is plain evidence to the record owner that he claims adversely. Actual residence on the land is sufficient, even without cultivation or improvement.⁴⁰ But it is plainly evident that where the claimant is not actually residing on the lands, that the nature and amount of evidence necessary to show actual, continued, notorious, distinct and hostile possession would be very different and much more difficult than in the case of occupied lands. To constitute adverse possession it is necessary to show that the acts of ownership were of such character as to openly and publicly indicate an assumed control or use of them as is inconsistent with the owner's claim to the premises in question.⁴¹

40. "In order to acquire title by adverse possession as against an elder grant, the party asserting such a title must take actual physical possession of all the land which he proposes to acquire, and hold it adversely, actually and continuously for the full statutory period: and the masting of hogs thereon, or the ranging of cattle, or the conducting of a sugar camp will not constitute such adverse possession within the meaning of the law." *Courtney v. Ashcraft*, 105 S. W. 106, 31 Ky. Law Report 1324.

"To maintain an actual adverse possession to woodland as such it is necessary that the person entering take actual possession by residence or cultivation of a part of the tract to which the woodland belonged. Actual possession may be taken by inclosing and cultivating without residence, or by residence without cultivation, under a bona fide claim, where there is a designation of the boundaries with the

ordinary use of the woodland." *Darrah v. Kadison*, 55 Pa. Super. Ct. 335; *D. W. Alderman & Sons Co. v. McKnight*, 78 S. E. 982, 95 S. Car. 245; *Whealton, et al., v. Doughty*, 72 S. E. 112, 112 Va. 649.

41. "As a general rule the law will not presume that possession separate from the title to real property is of an adverse character and every presumption favors the construction that it was in subordination to the title of the true owner; there must be proof that the possession was actual, continued, notorious, distinct and hostile." *Connor v. Detroit Term. R. Co.*, 183 Mich. 241; *Crosby v. City of Greenville*, 183 Mich. 452; *Murray v. Hudson*, 65 Mich. 670.

"Notoriety as to claim of title and possession is for the purpose of showing that the original owner had notice of the claim and possession and of its hostile character and is presumed to have acquiesced in the claim of the possessor; but

As to what acts are sufficient to constitute adverse possession the courts are varied in their opinions, as will be seen by the note below where cases both pro and con are digested.⁴²

where the original owner has actual knowledge of the adverse title and of the hostile possession thereunder, notoriety becomes immaterial, actual knowledge having taken its place." *Lasley v. Kniskern*, 152 Mich. 244; *Courtney v. Ashcraft*, 105 S. W. 106, 31 Ky. Law Rep. 1324.

42. The requirements of an adverse possession necessary to establish title to real estate are well understood, but the difficulty arises in applying these requirements to the particular case, which, as a rule, must be controlled by its own facts and circumstances." *Whitaker v. The Erie Shooting Club, et al.*, 102 Mich. 454.

"Where the testimony in support of a claim of adverse possession tends to show a continuous use of the land, by cutting the grass and pasturing the cattle thereon each year during the period of occupancy, in addition to planting trees upon the premises, it is a question for the jury whether such occupancy was practically continuous, exclusive, and hostile, and intended to be such by the claimants." *Saurs v. Giddings*, 90 Mich. 50.

Cases holding that acts of ownership of vacant, wild and unoccupied lands are not sufficient to constitute adverse possession:

Rucker v. Jackson, 60 So. 139, 180 Ala. 109; *Lightfoot v. Head*, 60 So. 752, 64 Fla. 364.

"Title cannot be acquired by adverse possession to land which is in a wild state, vacant and unoccupied, and on which no apparent acts of ownership have been per-

formed." *Haaz v. Wilson*, 154 Pac. 1018, 97 Kan. 176; *Davis v. Davis*, 163 S. W. 468, 157 Ky. 530; *Krueger v. Market*, 145 N. W. 30, 124 Minn. 393; *Jeffers v. Johnson*, 175 S. W. (Mo.) 581; *Morgan v. Pott*, 101 S. W. 717, 124 Mo. App. 371; *Wiechers v. McCormick*, 107 N. Y. Supp. 835, 122 App. Div. 860; *Talbot v. Cook*, 112 Pac. 709, 57 Or. 535; *Chilton v. White*, 78 S. E. 1048, 72 W. Va. 545; *Driver v. Martin*, 60 S. W. 651, 68 Ark. 551.

"Continuous use and occupancy for the time required by law for the purpose of range for cattle and hogs, and repeated occupation for the purpose of cutting timber, will not alone amount to actual possession of lands, within the law declaring that adverse possession of lands, accompanied by written evidence of title for seven years, will ripen into a perfect legal title, though the lands are so situated as to be unfit for actual physical residence, and unfit for cultivation and suitable only for the purpose above named." *McCook v. Crawford*, 40 S. E. 225, 114 Ga. 337; *Nicholson v. Aronson*, 48 Pac. 917, 58 Kan. 814; *De Lancey v. Hawkins*, 49 N. Y. Supp. 469, 23 App. Div. 8, judgment affirmed (1900) 57 N. E. 1108, 163 N. Y. 587.

"The inclosure of a tract of land with a large quantity of other lands in a pasture by means of a small amount of fencing, the remainder of the inclosure being by natural barriers, such as streams and bayous, is not such an actual and visible appropriation of such tract as to

constitute adverse possession." *Hyde v. McFaddin*, 140 Fed. 433, 72 C. C. A. 655.

Cases holding acts sufficient to perfect title by adverse possession: *Folley v. Thomas*, 93 N. E. 181, 45 Ind. App. 559; *Thompson v. Stillwell*, 161 S. W. 681, 253 Mo. 89; *Myers v. Mayhew*, 32 App. D. C. 205.

"Adverse possession of unproductive lands consisting of barren sand hills cut up by sloughs is shown by recording the deed under which the occupant claims, cutting all the timber of any value thereon, having the land surveyed and boundary lines grubbed out and staked, going upon the land at intervals, claiming absolute ownership, clearing a small portion, building a brush fence around the portion cleared, employing agents in the neighborhood of the land to look after it, and paying taxes, without proof of actual occupation." *Worthley v. Burbanks*, 45 N. E. 779, 146 Ind. 534.

Moore v. Hinkle, 50 N. E. 822, 151 Ind. 343. "Neither actual occupation, cultivation, nor residence is necessary to constitute 'actual possession' of property in such sense as to render it adverse to the true owner, where the property is so situated as not to admit of permanent useful improvement, and the continued claim of the party is evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." *McCaughn v. Young*, 37 So. 839, 85 Miss. 277.

"Where defendant took possession of ground under color of title in April, 1885, and had ashes and

other rubbish removed, and occupied it that year as a garden, and the following year constructed a barn on it, and continued in actual, open and notorious possession under claim of title until June, 1896, he was entitled to a decree of ownership in the ten years statute of limitation." *St. Lukes Parish of Cedar Falls v. Miller* (Iowa), 84 N. W. 686.

"In an action over a disputed boundary line it appeared that part of the land in dispute was cleared and cultivated by defendant, and the rest allowed to remain in timber, and used by him for cutting timber according to his needs. Held, that an instruction that, to show occupancy, it is not necessary that land be cleared and cultivated, but it is sufficient to show that it has been occupied for any purpose connected with farm usage, is not erroneous." *Henry v. Henry*, 80 N. W. 800, 122 Mich. 6.

Sproule v. Alabama & V. Railway Co., 29 So. 163, 78 Miss. 88. "Where it appeared that a railroad company built its tracks across lands in controversy in 1868, and from that time to the commencement of the suit, in 1883, occupied and used the land for a right-of-way, and there was no evidence tending to show that the railroad company entered into possession by permission of the plaintiffs, such actual, open, and continuous possession by the railroad company, was of itself, sufficient evidence that the possession was adverse to plaintiff's." *Turner v. Union Pacific Ry. Co.*, 112 Mo. 542, 20 S. W. 673.

City of Houston v. Finigan (Texas) 85 S. W. 470. "Actual

Lands that are not actually occupied as a residence may be divided into two classes. First: Such lands as are cultivated, improved and inclosed, and second: Such lands as are wild and unimproved.

In the first class, it is generally held that the inclosing and cultivating the lands is sufficient to give the true owner notice that the lands are being held adversely, and if such acts continue for the statutory period it will give the claimant a good title to the lands.⁴³ And though in the interim between harvest and recropping no person was actually on the land, and nothing done thereon, yet if such cropping continued from year to year this would be sufficient to constitute adverse possession.⁴⁴ Actual physical inclosure by fence is not necessary to title by

occupancy of premises, so as to indicate at every instance of time, by mere observation, the extent of the hostile use, it not necessary to satisfy Rev. St. 1893, Sec. 4214, providing that for the purpose of constituting an adverse possession of land shall be deemed to have been occupied only when it has been protected by an inclosure or has been usually cultivated since it need be only such continuous, exclusive, hostile use as in the judgment of the jury, under all the circumstances is sufficient to notify the true owner, actually or constructively, of the invasion of his rights and the actual extent thereof." *Illinois Steel Co. v. Bilot*, 85 N. W. 402, 109 Wis. 418, 83 Am. St. Rep. 905.

"Actual inclosure is not necessary to constitute adverse possession. Any occupation, visible and notorious, of which the property is susceptible, and which includes the true owner is sufficient." *Holtzman v. Douglas*, 5 App. D. C. 397, affirmed (1897) 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466; *Pearson v. Adams*, 29 So. 977, 129 Ala. 157.

43. *Cook v. Clinton*, 64 Mich. 309; *Murray v. Hudson*, 65 Mich. 670.

Actually occupancy by the real owner is not essential to adverse possession, if the nature of the occupancy is such that he ought or might have known. *Bird v. Stark*, 66 Mich. 654.

44. "Adverse possession under the statute must be open, notorious, continuous, exclusive, visible and distinct, as well as adverse. There must be an actual occupancy, as distinguished from constructive possession, of a portion of all of the premises claimed; not necessarily living thereon, for, if the premises are inclosed and cultivated, this would be a sufficient actual occupancy; and if crops were continually grown thereon, this would be a visible occupancy; and though in the interim between harvesting and recropping no person was actually on the land, and nothing done thereon, yet, if such cropping continued from year to year, this would be a continuous and notorious occupancy." *Cook v. Clinton*, 64 Mich. 309.

adverse possession if the claimant shows by other acts that are certain, and it is not necessary that the actual cultivation of the land be extended to the line claimed, if the acts done make it manifest that he intends to claim to the line.⁴⁵ But although he may not actually cultivate to such line it is absolutely essential that there be an actual possession of some kind.⁴⁶

To claim title by adverse possession of wild and unoccupied lands it is not necessary to show that the lands have been cultivated or inclosed by the claimant. Only such acts of possession are required as are consistent with the nature and condition of the land, but they must be of such a nature as should notify the real owner of such possession if he were passing by.⁴⁷ It is not necessary that they be such as would notify a passing stranger.⁴⁸ Use of land as a wood lot appurtenant to

45. *Sauers v. Giddings*, 90 Mich. 50. "Actual physical inclosure by fence is not necessary to title by adverse possession, if the claimant shows his occupancy and claim of title in some other certain way; and it is not necessary that cultivation or improvement extend to the line claimed, if the acts done manifest intent to claim to the line." *Lyons v. Fairmont Real Estate Co.*, 77 S. E. 525, 71 W. Va. 754; *Dreger v. Budde*, 113 N. W. 950, 133 Wis. 516.

46. *Cook v. Clinton*, 64 Mich. 309; *La Fountain v. Dee*, 110 Mich. 347.

47. *Crosby v. City of Greenville*, 183 Mich. 452. "When one enters upon land under color of title and with claim of ownership, any acts of user which are continuous, and indicate unequivocally to the neighborhood in which the land is situated that it is appropriated exclusively to his individual use and ownership, are sufficient to render the possession adverse." *Murray v. Hudson*, 65 Mich. 670.

Whitaker v. The Erie Shooting Club, et al., 102 Mich. 454; *Merritt v. Westerman*, 180 Mich. 449. "Where the purchaser of a void tax title upon a piece of wild land took such possession and made such use of the land as was reasonable under the circumstances, but for a period of ten years thereafter did nothing to indicate actual possession to the owner or a stranger passing over the land, he did not obtain title by adverse possession under color of title, though the owner had actual knowledge of his claim." *Lasley v. Kniskern*, 152 Mich. 244.

48. *Murray v. Hudson*, 65 Mich. 670; *Whitaker v. The Erie Shooting Club, et al.*, 102 Mich. 454; *Merritt v. Westerman*, 180 Mich. 449. "Title cannot be acquired by adverse possession to land which is in a wild state, vacant and unoccupied, and on which no apparent acts of ownership have been performed." *Haas v. Wilson*, 154 Pac. 1018, 97 Kan. 176.

ones farm, and the exercise of ones acts of ownership as are necessary to such use, amount if continuous and uninterrupted, to actual possession.⁴⁹ The posting of notices around a piece of land from early in the spring until late in the autumn for twelve successive years, that the land belongs to a certain club together with a notice that all trespassers will be prosecuted, are sufficient.⁵⁰ But such signs must be continuous throughout the period provided by statute.⁵¹ The cutting of grass and timber, ditching, paying general and special taxes are sufficient if the same are open, notorious and continuous.⁵² The possession may be constructive only.⁵³ The masting of hogs thereon or the ranging of cattle, or the conducting of a sugar camp will not of itself be sufficient.⁵⁴

49. *Murray v. Hudson*, 65 Mich. 670.

50. "That the notices which were posted around the land from early in the spring till late in the fall, every year for twelve successive years, were notices of an adverse title and possession; that the owner, if he had visited the land could not have failed to understand their meaning, as they were inconsistent with his rights as the original owner of the fee." *Whitaker v. The Erie Shooting Club, et al.*, 102 Mich. 454.

51. *Whitaker v. The Erie Shooting Club, et al.*, 102 Mich. 454.

52. "That while it may be conceded that paying taxes, or asserting title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting was not sufficient to establish title by adverse possession, yet such acts were all competent evidence to be considered in determining the question." *Whitaker v. The Erie Shooting Club, et. al.*, 102 Mich. 454.

Sauers v. Giddings, 90 Mich. 50. "The claim of a tax title is necessarily hostile to that of the original owner," *Lasley v. Kniskern*, 152 Mich. 244.

53. *Cook v. Clinton*, 64 Mich. 309; *Fuller v. Swensberg*, 106 Mich. 305. "Constructive actual possession of lands for the statutory period bars recovery thereof by the title holder as effectively as a purely actual possession." *Miniard v. Napier*, 180 S. W. 363, 167, Ky. 208.

54. *Sauers v. Giddings*, 90 Mich. 50. "In order to acquire title by adverse possession as against an elder grant, the party asserting such a title must take actual physical possession of all the land which he proposes to acquire, and hold it adversely, actually, and continuously for the fully statutory period; and the masting of hogs thereon, or the ranging of cattle, or the conducting of a sugar camp, will not constitute such adverse possession within the meaning of the law." *Courtney v. Ashcraft*, 105 S. W. 106, 31 Ky. Rep. 1324.

§ 75. **Adverse Possession Against the State.**—The statute of limitations runs against the state the same as it does against an individual, the statute providing:⁵⁵ “No suit for the recovery of land shall be commenced by or in behalf of the people of this state, unless within fifteen years after the right or title of the people of the state therein first accrued, or within fifteen years after the said people, or those from or through whom they claim, shall have been seized or possessed of the premises, or shall have received the rents and profits of the same, or some part thereof.”

By reason of another section of the same act, the foregoing provisions of the statute do not apply to actions brought by municipal corporations for the recovery of possession of any public highway, street or alley, or other public ground.⁵⁶

§ 76. **Tacking Successive Possessions.**—Where the possessions of successive adverse occupants hold continuously for successive periods of adverse occupation, their holdings may be tacked to each other when each occupant takes under the next preceding occupant by descent, will, grant, or by voluntary transfer of possession.⁵⁷

In order that possession of successive occupants may be tacked it is essential that privity either of contract, estate, or blood, should exist between the successive occupants.⁵⁸

The entry of the succeeding occupant must be with the consent of his predecessor, evidenced by contract or by an act of law passing the estate from the latter to the former.⁵⁹

Privity is necessary in order that the successive possessions may be connected with each other,⁶⁰ but the following statute in Michigan has dispensed with the necessity of privity be-

55. Compiled Laws 1915, Section 12321.

56. “Within fifteen years in all other cases, provided that the provisions of this section shall not apply to actions brought by any municipal corporation, for the recovery of the possession of any public highway, street, or alley, or any

other public grounds.” Section 12311, Compiled Laws 1915.

57. Gates Mich. Real Property. 657.

58. *Sheldeon v. Mich. Cent. R. R. Co.*, 161 Mich. 503.

59. *Shaw v. Nicholay*, 30 Mo. 99.

60. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241.

tween successive occupants under certain circumstances.⁶¹ The statute provides: "That no person shall commence an action for the recovery of lands nor make any entry thereupon unless within twenty years after the right to make such entry or bring such action first accrued, or within twenty-five years after he, or those from, by or under whom he claims, shall have been seized or possessed of the premises," and it was held that the land-owner is barred by the lapse of twenty-five years, although there may have been no privity between successive disseizors in possession of the property during the twenty-five years, but to be barred in twenty years there must be privity between the successive disseizors.⁶²

Privity exists between vendor and vendee such as will authorize the tacking of their successive possession in the vendees.⁶³ The fact that the deed was not recorded,⁶⁴ or that the vendor remains in possession,⁶⁵ or the vendee did not receive the deed at the time of the purchase, if he took possession on that date, will not affect the operation of the rule.⁶⁶

A purchaser of land at a judicial sale may tack his possession to that of the person whose land is so sold to make up the statutory period,⁶⁷ but the sale must rest on a valid decree, judgment or order.⁶⁸

Where the vendor permits the vendee in a contract of purchase to take possession, the occupancy of the vendee inures to the benefit of the vendor for the purpose of perfecting title of the latter by adverse possession and may be tacked to his possession to perfect title in him.⁶⁹ The possession of such vendee cannot be tacked to that of his grantee to make up the

61. Rev. Stat. Mich. (1838) pp. 573, 574, Sec. 1; re-enacted in Comp. Laws Mich. 1915, Sec. 12311, changing the period to fifteen years.

62. *Riopelle v. Gilman*, 23 Mich. 33; *Vincent v. City of Kalamazoo*, 111 Mich. 230.

63. *Gildea v. Warren*, 173 Mich. 28.

64. *North Pac. R. Co. v. Concanon*, 75 Wash. 591 (135 Pac. 652).

65. *Clithero v. Fenner*, 122 Wis.

356, 99 N. W. 1027; *Whiteford v. Crooks*, 54 Mich. 261.

66. *Barron v. Barron* (Ala.), 25 La. 55.

67. *Peele v. Chener* (Mass.), 8 Allen 89; *Martenson v. Murphy*, 153. Wis. 389 (191 N. W. 273).

68. *Callier v. Coutts*, 92 Tex. 234; 47 S. W. 525.

69. *Sargent v. Ballard* (Mass.), 9 Pick; 251; *Rodgers v. Beckwith*, 172 Mich. 544.

statutory period for the purpose of perfecting title by adverse possession in the vendee,⁷⁰ but in Michigan by statute a vendee may secure a title by adverse possession where he claims under a contract of purchase, having been in possession for a period of twenty years after the last payment was due on the contract or after the last payment was made on the contract of purchase.⁷¹

A landlord may tack the possession of his several tenants where it appears there was continued possession of the tenants.⁷²

Privity exists between two successive holders where the latter takes under the earlier by descent.⁷³ In Michigan the statute provides that if the right or title of the person bringing an action for the recovery of lands first accrued to an ancestor, predecessor or grantor, of the person bringing the action, the period of limitation is to be computed when the right or title so first accrued to the ancestor, etc.⁷⁴

The possession of an administrator, where he has the legal right to possession of the intestate's real estate,⁷⁵ or the trustee of a bankrupt, may be tacked to complete the bar to the statute of limitations.⁷⁶

If a mortgagor, who is in adverse possession, orally transfers his occupancy to his mortgagee, the two possessions may be tacked.⁷⁷

Where a claimant to property had sold the same in contract to successive purchasers who forfeited their rights and to whose possession the claimant from time to time succeeded, he thereby became entitled to tack their possessions to his own, in order to make out his title by adverse possession.⁷⁸

70. *Plumer v. Brown*, 8 Metc. (Mass.) 578.

71. *Comp. Laws Mich.* 1915, Sec. 12314.

72. *Murphy v. Com.*, 187 Mass. 361; 73 N. E. 524.

73. *Trast v. Courtis*, 172 Mass. 401, 52 N. E. 515.

74. *Comp. Laws Mich.* 1915, Sec. 12312.

75. *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407.

76. *Cannon v. Prude* (Ala.), 62 So. 24.

77. *Harrison v. Spencer*, 110 Mich. 215.

78. *Meritt v. Westerman*, 165 Mich. 535.

Where successive grantees of land take possession of a strip of land adjoining that described in their deeds claiming title thereto under their deeds, their successive adverse possession may be tacked to make out the statutory period.⁷⁹

Possession of a strip of land by a tenant inures to the benefit of his landlord, and cannot be tacked on to his occupancy as owner, after his purchase from the landlord of adjoining land, for the purpose of establishing title by adverse possession.⁸⁰

Separate successive disseizins cannot be tacked so as to constitute one and a single continuous possession, unless there is privity of estate, he cannot have the benefit of the grantor's possession of lands which are not conveyed by the deed.⁸¹

§ 77. Titles Held to Be Defective—Michigan Decisions.—Where the record shows that the title to real estate is based upon the foreclosure of a mortgage by advertisement, and the record does not show that such mortgage contains a power of sale, the title is not marketable, even though the sheriff's deed contains a recital that the sale so made was pursuant to a clause contained in the mortgage, as such recital in the sheriff's deed is no evidence of the fact.⁸² A title is not marketable which rests upon a deed which essentially misdescribes the property conveyed.⁸³

Where a suit is pending for specific performance of another contract against the vendor, which suit remains undetermined, such title is not merchantable.⁸⁴

An individual holding title to land through a tax deed has a marketable title to such real estate after such notices as required by law had been served for the perfection of such tax title.⁸⁵

Where a vendor has a title merchantable through adverse possession, such title does not meet the requirements of a contract calling for a merchantable title of record.⁸⁶

79. *Gildia v. Warren*, 173 Mich. 28.

80. *Wilhelm v. Herron*, 211 Mich. 339.

81. *Sheldon v. Mich. Central R. Co.*, 161 Mich. 503; *Lake Shore, etc., R. Co. v. Serling*, 189 Mich. 366.

82. *Bradway v. Miller*, 200 Mich. 648.

83. *Id.*

84. *Surgey v. Dickey*, 199 Mich. 251.

85. *Hicks v. Smith*, 183 Mich. 137.

86. *Lake Erie Land Co. v. Chlinski*, 197 Mich. 216.

It is not essential that the vendor have a merchantable title at the time of the execution of the contract, if he is able to give a good title at the time he is required to do so under the terms of said contract.⁸⁷

Where a vendor's title to the land at the time the contract was executed was defective, the vendor will not be permitted to rescind the contract for that reason if it appears that the vendor would be able to secure title at the time of the performance of the agreement.⁸⁸

Where the record did not show that the vendor had acquired the outstanding interests of two heirs to the land, he was unable to convey a marketable title.⁸⁹

One who had obtained land on a contract, and having assigned to three others an undivided $\frac{1}{4}$ interest in said contract, was not in position to give a merchantable title to another who had notice of the assignment.⁹⁰

Where title has been acquired through tax title, and more than five years have elapsed since he obtained such tax title, he is in position to give a merchantable title to real estate.⁹¹

Where vendor obtained title to the land through foreclosure of a mortgage, and the sale under such foreclosure was made ten years after the decree was entered, the title was for that reason, sufficiently doubtful so that the vendor could not give a marketable title to the land.⁹²

Where a warranty deed was signed by a wife in blank and was afterwards filled in by the husband, the dower interest of the wife in the property is not barred and such deed does not convey a marketable title.⁹³

Where a title was derived through foreclosure proceedings, and certain attaching creditors at the time of such proceedings, and certain parties holding a mortgage, were not made parties

87. *Rogers v. Eaton*, 181 Mich. 620; *Darling v. Huff*, 175 Mich. 304.

88. *Silver v. Daenzer*, 167 Mich. 362.

89. *Weaver v. Richards*, 144 Mich. 395.

90. *Schwartz v. Woodruff*, 132 Mich. 513.

91. *Boynton v. Veldman*, 131 Mich. 555.

92. *Walker v. Gillman*, 127 Mich. 269.

93. *Maynard v. Davis*, 127 Mich. 571.

to such foreclosure proceedings, they were not affected thereby, and the vendor could not for that reason, give a marketable title to the land.⁹⁴

Where the statute provides that all persons who are minors, when their right to sue for land first accrues, may bring an action at any time within five years after attaining their majority for the recovery of such land and an administrator of an estate who has purchased a portion of the estate of said minor at a judicial sale, cannot give a perfect title to such property within 5 years from the time the youngest minor becomes of age as such minor has the right to repudiate such sale at any time within such five-year period.⁹⁵

Where property was devised to a vendor under a will, such vendor could not give a good title to such real estate until after the probate proceedings had been closed, for the reason that claims might be outstanding in sufficient numbers to make it necessary to sell the real estate.⁹⁶

If land contracted to be conveyed in a land contract is encumbered or clouded by an outstanding life estate, the vendor cannot convey a good and marketable title.⁹⁷

Where the title of property was encumbered by an execution sale which had been previously made, such title is not marketable.⁹⁸

The mere fact that a mortgage on real estate has not been released from the records, if such mortgage has been actually paid, will not prevent the owner from giving a good and marketable title to the property.⁹⁹

We have appended to this note an abstract of the Michigan decisions wherein titles have been held to be defective.¹⁰⁰

94. *Todd v. McLaughlin*, 125 Mich. 268.

95. *Ford v. Wright*, 114 Mich. 122.

96. *Platt v. Newman*, 71 Mich. 112.

97. *Deitman v. Arnold*, 71 Mich. 656.

98. *Scadin v. Sherwood*, 67 Mich. 230.

99. *Curran v. Rogers*, 35 Mich. 220.

100. *Bradway v. Miller*, 200 Mich. 648. An agreement in a land contract that the vendor shall give an abstract showing a marketable title is good, and one which shows that the title rests upon the foreclosure of a mortgage, where such mortgage does not contain a power of sale, does not show a marketable title.

Bradway v. Miller, 200 Mich. 648. A title is not marketable which

rests upon a deed which essentially misdescribes the property conveyed.

Bradway v. Miller, 200 Mich. 648. An agreement in a land contract to furnish an abstract showing a marketable title is not complied with by evidence of adverse possession which might prevail in an ejectment suit or a suit to secure the correction of the records, and a request on the part of the plaintiff in a specific performance suit for time to have the records corrected was properly denied.

Sorge v. Dickie, 199 Mich. 251. The abstract showed a previous bill for specific performance brought by another party which was then pending. Such an abstract fails to show a merchantable title in the vendor.

Lake Erie Land Co. v. Chilinski, 197 Mich. 214. Where the contract provides for an abstract showing a merchantable title, such title must be shown in the abstract. If the abstract does not show a merchantable title, the provision of the contract is not satisfied by parol evidence showing a merchantable title in fact.

Hicks v. Smith, 183 Mich. 37. A person holding title to land through a tax deed can convey a marketable title to land to a purchaser under a land contract after such notices have been served for the perfection of the title as required by law. In this case it was claimed that the notices required by law to perfect the title under a tax deed were not legally and properly served.

Rogers v. Eaton, 181 Mich. 620. It was claimed here that the contract for the sale of land was void because the vendor at the time the contract was entered into could not

give a good title to the same, although the vendor was able to give such title at the time the contract was to be performed. It is not essential that the vendor have the title to the land at the time he enters into the contract, if he is able to give good title at the time of performance.

Darling v. Haff, 175 Mich. 304. The property of the vendor was encumbered by a deed to secure a loan at the time the contract was entered into, but he was able to give good title at the time of performance. The purchaser was not in a position to claim fraud or deceit in not disclosing the condition of the title at the time the contract was entered into.

Silfver v. Daenzer, 167 Mich. 362. Vendor's title to the land at the time the land contract was executed was defective. Because of the defect the vendee attempted to rescind the contract and demand the return of the money paid. At the time the vendor was having the title perfected, and in fact had the title perfected at the time he was bound to perform under the terms of the contract. The vendor cannot rescind the contract because of defective title at the time the contract was executed, if the vendee was able to clear up the title and actually did have the title cleared up at the time he was bound to perform.

Cossett v. O'Riley, 160 Mich. 101. A suit was pending to set aside an assignment of mortgage against the land that the defendant had contracted to sell to plaintiff. A lis pendens of said suit had been filed. The fact that the vendor believed his statements to be true at

the time that he made them does not relieve him of the effects of his false statement where he has agreed to give a good and merchantable title to the land. But if he is able to make the title good and offers to do so, the contract is not subject to rescission for the fraud.

Weaver v. Richards, 144 Mich. 395. The record did not show that the vendor had acquired the alleged outstanding interests of two heirs in the lands. Under a contract to convey land, the vendor is bound to convey to the purchaser a merchantable title, viz., one which is unassailable on the face of the record as well as in fact.

Schwartz v. Woodruff, 132 Mich. 513. One, who had obtained land on contract, having assigned to three others an undivided one-fourth interest in said contract, cannot give a perfect title to another who has notice of the assignment.

Boynton v. Veldman, 131 Mich. 555. Vendee takes the position that vendor cannot give a marketable title to the premises under a land contract because the vendor is owner of the land in common with another party named Bell. Bell and the vendor obtained their interests in said land by different instruments and at different times. Vendor purchased the tax titles to said land, said land having been sold for taxes because of Bell's failure to pay the taxes. Bell never made any objection to the purchase of these titles by the vendor. Five years have elapsed since said purchase of the tax titles and Bell has not made any claim to the property.

Held that the vendor can give a

good and marketable title to the premises.

Walker v. Gillman, 127 Mich. 269. vendor obtained title to land through a foreclosure sale which took place more than 10 years after the decree was entered. The title was at least doubtful, so the vendor could not give a good title to the land.

Maynard v. Davis, 127 Mich. 571. A warranty deed signed by the wife in blank and afterwards filled in by the husband does not bar the dower interest of the wife in the property, and such deed does not convey a marketable title.

Todd v. McLaughlin, 125 Mich. 263. It is claimed that as certain attachments placed upon land which had been sold by means of a land contract had been withdrawn, and that a mortgage and assignment for the benefit of creditors by the vendor had been released, that the vendor could give a good and marketable title to the land. This cannot be done, as the attaching creditors, the assignee for the benefit of creditors, and the party holding the mortgage were not made parties defendants to the foreclosure proceedings, which had been brought by the vendor to compel performance of the contract.

Ford v. Wright, 114 Mich. 122, 2 Howell's Stat. Sec. 8702, provides that all persons who are minors when their right to sue for land first accrues may bring an action any time within five years after attaining their majority. An administrator of an estate and guardian of the minor children, who has purchased a portion of the estate at a judicial sale, cannot give a perfect title to such property within

five years from the time that the youngest minor becomes of age. If there is a reasonable doubt as to whether the title is good the title is not marketable.

Barnard v. Brown, 112 Mich. 452. In this case the vendor under the land contract obtained possession of the land by adverse possession. If the title is in fee and unencumbered, it is not necessary that the title be perfect upon the record in order to make it a marketable title. A marketable title is one of such character as should assure to the vendee the quiet and peaceable enjoyment of the property, and one which is free from encumbrance.

Platt v. Newman, 71 Mich. 112. Where the contract for the sale of lands provides that the vendee shall be protected from all interference in regard to the title of land, both legal and otherwise, the vendee is not obliged to rely on the warranties or covenants of the deed. He is entitled to a perfect title. The fact that the vendor was the devisee in a will of the property conveyed in the contract, where the estate has not been settled by probate proceedings, does not make it possible in itself for the vendor to give a perfect title, as it does not settle the matter of claims that may be outstanding against the estate.

Dikeman, et al. v. Arnold, 71 Mich. 656. If land contracted to be conveyed in a land contract is encumbered or clouded by an outstanding life estate, the vendor cannot convey a good and marketable title, as there is a reasonable

doubt as to the sufficiency of the title.

Scadin v. Sherwood, 67 Mich. 230. The title to the property sold on a land contract was encumbered by an execution sale which had been previously made. It is the contention of the defendants that the execution sale is void and that the plaintiffs can recover the land by an ejectment suit, and therefore cannot repudiate the contract. Held that the plaintiffs are entitled to a good and marketable title, and cannot be compelled to accept land where they would be compelled to litigate for the same.

Gale v. Goult, et al., 40 Mich. 515. A grantee by voluntary deed, where no fraud has been shown, has a good title as against the grantor and any subsequent grantee or mortgagee under him, or any subsequent creditor.

Curran v. Rogers, 35 Mich. 220. The mere fact that a mortgage on real property has not been released from the records if such mortgage has been actually paid will not prevent the owner from giving a good and marketable title to the property.

Allen v. Atkinson, 21 Mich. 351. Where one contracts to sell land and the contract is silent as to the title, it is presumed that the title is good, yet nevertheless the vendee is entitled to a good and marketable title to the land. Where the record shows an apparent encumbrance on the land the vendee has a right to a reasonable time to investigate the title before carrying out his part of the contract.

§78. **Defective Titles—Decisions from Other States.**—In the accompanying note we have collected a large number of cases giving a brief abstract of those decisions from various states wherein the titles have been held to be defective.¹⁰¹

101. *Hedderly v. Johnson*, 42 Minn. 443, 44 N. W. 1056, 12 A. S. R. 521. In a conveyance of real estate was the following clause: "Reserving, however, a strip of land one hundred and fifty feet wide, to be used by the said railroad company for a right-of-way or other railroad purposes where the main line of its road, or any of its branches, as now located and constructed, or hereafter to be constructed is laid or may pass over said land." This easement was claimed to make it reasonable doubtful whether the vendor could give a title free from all encumbrances, and therefore be marketable. The easement depended on the fact of the then location of the line; and as there is, as the case shows, no doubt that no line had then been located, and as the matter appears to be easily and readily proved at any time, the clause does not make the grantee's title unmarketable. If the doubt raised a question of law, it must be a fairly debatable one, one upon which the judicial mind would hesitate before deciding it. If the doubt depended on a matter of fact, and there is no doubt as to how the fact is, and if it may be readily and easily shown at any time, it does not make the title unmarketable.

Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 A. S. R. 736, 3 L. R. A. 739. The vendor in this case was a subpurchaser. The executors of an estate had sold certain lands to a party by the

name of Mesick on an executory contract of sale, who in turn made out an executory contract of sale to the vendor under the contract in issue in this case. It is claimed that under the will the executors had no power to enter into the contract with Mesick. If this is true the vendor cannot transfer to the defendant a title free from reasonable doubt and can only transfer one which might be subject to litigation later. Held that the vendee is entitled to a title free from any reasonable chances as to future litigation, that under the circumstances of this case the plaintiff is unable to give such a title and therefore the title is unmarketable. *Howe v. Coates, et al.*, 97 Minn. 385, 107 N. W. 397, 114 A. S. R. 723, 4 L. R. A. (N. S.) 1170. The contract in this case provided that the vendor should furnish the vendee with an abstract within a certain time showing a good title in the vendor. The abstract furnished showed that a previous lease and also a contract of sale against the property, but did not show that said lease and contract had ever been withdrawn. It was contended that the title was clear in fact and that affidavits could be produced as proof showing that said lease and contract had been withdrawn and that they were no longer an encumbrance to the title. Held that the vendor could not give a marketable title, as the contract provided for an abstract showing a marketable title, and this not being furnished.

proof of a marketable title in fact is not sufficient. The contract was construed and held to call for a marketable record title.

Howe v. Coates, et al., supra. A title open to reasonable doubts is not marketable, and the court cannot make it so by passing upon an objection depending upon a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right or claim is vested.

Howe v. Coates, et al., supra. A title to real estate is not marketable when so defective as to effect the value of the land or interfere with its sale.

Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 12 A. S. R. 844, 5 L. R. A. 654. The vendee in this case refused to perform his part of the contract and accept a deed because of a judgment that had been rendered against the vendor and apparently was a lien against the property which the vendor contracted to sell to the vendee. It is claimed on behalf of the vendor that although he held said land in his own name, it was in reality the property of a firm and that it had been deeded to him in trust for the purpose of sale, and that as a result the judgment against the vendor cannot be a lien on the land. Held that the vendor could not give such a title as the vendee was entitled to. He could not give a marketable title.

Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 17 A. S. R. 634, 8 L. R. A. 591. In this case there was an outstanding right in the land contracted to be sold by one who had left home 24 years before, being at the time 23 years of age, unmarried

and in feeble health, and very dissipated, and who was seen shortly after in destitute circumstances, and never heard from again, and it further appears that no opposing title has ripened by adverse possession. The vendee claims that these facts place a reasonable doubt upon the title and therefore the vendor cannot give a marketable title. Vendor contends that the failure to hear from the one claimed to have an outstanding right in the land for a period of 24 years raises a presumption of death and therefore removes any doubt upon the title. It has previously been held in this court that where the owner of the outstanding title has not been heard from for a period of 40 years that the presumption of death exists, *Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387.* But under a contract for a first-class title, the absence of the owner of an outstanding interest for a period of 23 years and not having been heard from within that time is not sufficient to clear the title from a reasonable doubt so that the vendor can give a marketable title.

Herman v. Somers, 158 Pa. St. 424, 27 Atl. 1050, 38 A. S. R. 851. In a contract for the sale of property, a provision that it shall be free from all liens and encumbrances, and that the hand money shall be refunded if title should not prove good on examination of records, or cannot be made good, is equivalent to a covenant to convey a marketable title. In equity a marketable title is one in which there is no doubt involved, either as law or fact. Every title is doubtful which invites or exposes the party holding it to litigation. If

there be color of outstanding title, which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it, and encounter the hazard of litigation.

Williams v. Bricker, et al., 83 Kan. 53, 109 Pac. 998, 30 L. R. A. (N. S.) 343. A will provided that a life estate should be given to testator's wife, and the remainder to the four children, providing that if any of the four children should die before the life estate was terminated, the share of such deceased child shall go to such decedent's children, and if there are no children then to be divided equally between the remaining children of the testator. The widow and the four children joined in giving a warranty deed to the vendor in this case. Before the widow of the testator died one of the children died, leaving heirs. It is contended that the vendor can give a good marketable title to the property.

A title need not in fact be had in order to make it unmarketable. The question is whether a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would accept the title in the ordinary course of business; nor is it enough, even, that the court on the whole consider it good. If there be doubt or uncertainty sufficient to form the basis of litigation, the title is unmarketable.

In an action to recover back purchase money for the failure of the vendor to comply with an agreement to furnish a marketable title, where the parties whose possible claims may affect the title are not

before the court, the question of law upon which the title turns will not be determined, but the title will be deemed unmarketable if the question is one upon which it is apparent that other courts might entertain a different opinion.

Allen v. Pockwitz, 103 Cal. 85, 36 Pac. 1039, 42 A. S. R. 99. In this case the contract of sale provided that the title should be accepted or rejected by the vendee's attorney. It was contended that if the title was in fact good and marketable the vendee should be compelled to accept the land regardless of the opinion as to the title by the vendee's attorney. Held that the fact as to whether the title was in fact marketable is not to be considered, that the vendee had a right to act upon the opinion of his attorney as to whether the title was marketable.

Close v. Stuyvesant, 132 Ill., 607, 24 N. E. 868, 3 L. R. A. 161. It was claimed in this case that the vendor had obtained his interest in the land in controversy through defrauding the United States government under the pre-emption and homestead law. The lands were entered under this law by several men who had previous to receiving their certificates from the local land office, arranged with the vendor to transfer said lands to him. This is prohibited by said laws and was null and void. Held that vendor could not give a good and marketable title. It is not necessary that the defendant in an action for specific performance prove actual fraud on the part of the vendor in securing his title, it is sufficient to prove that the vendor could not give a title free from reasonable

doubt, and could only give such title as may be the subject of future litigation.

Smith v. Hunter, 241 Ill. 514, 89 N. E. 686, 132 A. S. R. 231. In specific performance the abstract of title must be held not to show good merchantable title, where it shows a decree reforming a deed less than three years before the time fixed for consummating the sale but fails to show that the court acquired jurisdiction of a necessary party to the proceeding in such manner as to bar his right to come in, under Sec. 19 of the Chancery act, and petition to open the decree and defend the suit to reform the deed.

Where the vendor in a contract for the sale of land has agreed to furnish an abstract of title showing good merchantable title in him, all the vendee need to do to defeat a bill by the vendor for specific performance is to show that the title which the vendor was prepared to convey was doubtful in character.

Attebery v. Blair, 244 Ill. 363, 91 N. E. 475, 135 A. S. R. 231. Purchaser contracted for a good title, free and clear from encumbrances and that such title shall be shown by the abstract of title. It is contended by the purchaser that the vendor cannot give a good title as the abstract does not show that certain mortgages made seventy years ago were released of record; that certain mortgages and deeds do not show on the record as to whether the grantors were married or not; that the abstract does not show whether the deeds and mortgages were acknowledged, etc. It is not implied that an abstract should show matters not of record,

nor all the facts and circumstances connected with the conveyances which might affect the title. An abstract of title should contain a summary of all grants, conveyances, wills, and all records of judicial proceedings whereby the title is in any way affected, and all encumbrances and liens of record, showing whether they have been released or not, and should show all such facts or record as may impair the title.

An obligation to furnish an abstract of title showing a good title, free and clear from encumbrances is fulfilled if the abstract furnished, in connection with the rules of law applicable to the conveyances and with evidence of facts and circumstances explanatory of the records, shows such a title.

Imperfections in abstract of title may be cured by affidavits. Imperfections in an abstract of title, such as a failure to show who were the heirs of a party, whether a grantor was married or single, whether the name of a grantee was misspelled and what persons were intended where initials were given, may be cured by affidavits showing the facts.

Meyer v. Madreperla, 68 N. J. L. 258, 53 Atl. 477, 96 A. S. R. 536. This was an action by the vendee to recover back money paid on the purchase price as provided in a land contract, on the ground that the vendor cannot give a good merchantable title. It is claimed that in the chain of title a party by the name of Patrick McDermott if alive would have an interest, although very small, in the property. It is claimed on the other hand that as this party has been away from

home for more than seven years and has not been heard from during that period that under the law a presumption of death exists, and therefore the interest that Mr. McDermott would have in the property if alive, is because of such presumption only a possibility and not a probability. In order to defeat the performance of a land contract because of defect in the title it is necessary to show a moral certainty that the party entitled to the interest may appear and claim the interest. For it is impossible in the nature of things that a title can be shown to be good beyond a mathematical certainty. The court must govern itself by a moral certainty and not by a mathematical certainty. It is held that the possible future claim which Mr. McDermott may have if he should appear is not sufficient to defeat the contract of sale.

The court points out here that in a court of equity for the specific performance of this contract that the title might be held to be unmarketable, but as the Court of Law and Court of Equity in New Jersey are separate the law court is not governed by principles of equity. This is different in most states where the two courts are united.

Wesley v. Eells, 177 U. S. 370, 20 S. Ct. 661, 44 U. S. (L. Ed.) 810.

Vendor bought the property which is the subject of this suit from the State of South Carolina. He made a part payment and gave a mortgage to the state for the balance. Later a revenue bond credit slip was given which was contended by the vendor to wipe out the mortgage. The act of the legislature of South Carolina under

which this revenue bond credit slip was given was declared unconstitutional by the Supreme Court of South Carolina as being in violation of the Federal Constitution which provides that no state shall emit any Bills of Credit. The vendee contends that under this decision the mortgage has not been wiped out and that the same is still an encumbrance upon the property. Held that this question is one that would have to be settled by a suit against the State of South Carolina, and that the vendor could not give the vendee a title, except one that would be subject to future litigation, and therefore not at all marketable.

Conley v. Finn, 171 Mass. 70, 50 N. E. 460, 68 A. S. R. 399. It was claimed in this case that one of the former owners of the property which was the subject of the controversy in this action gave a deed to this property, that was neither acknowledged or recorded until after the death of the vendor in that transaction. The vendor in this suit claims title through the vendee of this former transfer.

It is presumed that a deed is delivered at the time of its date and it must be acknowledged before delivery. Also the vendor has obtained title by adverse possession. As the contract did not provide for a good title of record, therefore it was held that the vendor could give to the vendee a good title.

Irving v. Campbell, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620. A good title means not only a title valid in fact, but a marketable title that can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence.

A purchaser will not generally be compelled to take a title where there is a defect in the record title which can be cured only by a resort to parol evidence, and there has not been an undisputed adverse possession for a time sufficient to give title thereby.

Buchan v. German American Land Co., 180 Iowa 911, 164 N. W. 119. This was a case where the contingent interest of unborn children were involved. It was contended that a decree of a court quieting title could not affect the contingent interest of unborn children. On this question the court said: "The contingent interest of unborn children in real estate may be validly cut off by a judgment in a good faith action to quiet title. For instance, if all living children who are interested in the property are brought before the court, and they have identically the same interest which an after-born child would have, then a decree that the living children have no interest is binding on unborn children, on the necessary theory that, in said action, the living children represent the unborn. So held where the issue in an action to quiet title was whether a devisee took a fee simple title or whether he took a life estate with remainder to his surviving children."

"A title which is good as a matter of law is not rendered unmarketable by the possibility that vexatious litigation might be instituted in relation thereto, nor by the fact that attorneys had advised against accepting the land as security for a loan."

Batts v. Mallon, 151 Mass. 477, 25 N. E. 17, 7 L. R. A. 840. Land was

conveyed to a trustee for a married woman as sole beneficiary, and to his successors and assigns; he devised it to his wife for life, with remainder to such married woman; and she survived the wife and devised it to her daughters, by whom it was conveyed to a third person. Confirmatory releases were given to such grantee by the grantor of the original trustee, and by a trustee duly appointed for that purpose to succeed the latter; and the trust was then terminated upon due proceedings had. Held, that the grantee could convey a title good beyond a reasonable doubt.

Rife v. Lybarger, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403. The only cloud upon the title of the land was an uncanceled mortgage made contemporaneously with, and to secure, a series of promissory notes, which notes are all barred by the statute of limitations, and which mortgage, the mortgagee being dead, his estate solvent and finally settled, his widow and heirs-at-law released by a quit claim deed of the premises, made to the vendor for that express purpose. There was no evidence that said notes had been assigned before the quit claim deed was given. Held, that said mortgage is no cloud upon the title, and that the vendor could give a good marketable title.

Simis, et al., v. McElroy, 160 N. Y. 156, 54 N. E. 674, 73 A. S. R. 673. This was an action by the vendor against the vendee in a land contract for damages for failure to perform the same. It is contended on the part of the vendee that the vendor cannot give a good and marketable title to the land. It is admitted that the vendor cannot show

a good title in him of record, but claims that he has such title by adverse possession.

It is held that although apparently the vendor has good title by adverse possession, yet as the owners of record are not parties to this action they cannot be precluded in a future action from setting up matters which do not appear in this case that would shut off the claim of the vendor from his right to claim title by adverse possession. Hence the vendee would only be taking a title which may subject him to future litigation over the same. Therefore the vendor cannot give a marketable title.

Cummings v. Dolan, 52 Wash. 496, 100 Pac. 989, 132 A. S. R. 986. The abstract showed that two mortgages existed against the title, which were an apparent cloud upon the same. The vendee refused to accept the land because of this cloud. The holder of the mortgages gave the vendor quit-claim deed to the same which would bar any future claim to the property under the mortgages. Affidavits were also given for the purpose of showing that the mortgages were not originally intended to cover the property sold under the contract, but through a clerical error the mortgages apparently covered the property. The fact was that the mortgages were not intended to be a cloud upon the chain of title to the land covered by the contract. Held that the vendor could give a marketable title. A contract for a marketable title only calls for one that is reasonably free from doubt.

Simon, et al. v. Vanderveer, 155 N. Y. 377, 49 N. E. 1043, 63 A. S. R. 683. This was an action to recover

the price paid on a land contract on the ground that the vendor cannot give a marketable title. A lis pendens had been filed against the property sold. It was held that although the action upon which the lis pendens was filed would not have been a lien upon the property, the contract upon which such action was based was not produced by the vendor, and that it was not incumbent upon the vendee to search the records to satisfy himself as to the nature of the action. He had a right to rely upon the lis pendens.

Evans v. Taylor, 177 Pa. St. 286, 35 Atl. 635, 69 L. R. A. 790. In this action the plaintiff had agreed to give the defendant a good title to real estate free and clear from encumbrances. Through this land a street had been laid by the city plan. The purchaser is supposed to be informed of any streets actually existing over the lands or of any plans on record for the future opening of any and therefore cannot defend in an action for the purchase price where he has accepted a deed or done any act in confirmation of the contract. But as the contract in this case was executory and the purchaser had done nothing in confirmation of the same, the knowledge which he presumed to have as to street plans over the property, is not sufficient to permit the plaintiff to recover the purchase money where he has contracted to give a title free and clear of all encumbrances.

Kares v. Covell, 180 Mass. 206. The vendor had given a bond to convey property free and clear of all encumbrances. After this bond was made about a fourth of the

property conveyed was taken by the City of New Bedford for the widening of a street. It was claimed on the part of the vendor that as the taking of the property occurred after the giving of the bond that his inability to transfer the whole of the land is not a breach of the bond. Held that the agreement of the bond was to convey a title free and clear of all encumbrances at the time of performance, and his inability to do so is a breach of the covenant.

Downey v. Selb, 185 N. Y. 427, 78 N. E. 66, 113 A. S. R. 926, 8 L. R. A. (N. S.) 49. An action was brought by the vendor to reform a deed of the real estate which is the subject of the land contract, by which deed the said property was conveyed by the vendor's father to her. The father intended to give the daughter an absolute fee simple title to the property, but by mistake of the scrivener a life estate only was given with a remainder. The vendor made her mother, brothers and the executor of a will parties defendant. There was no contest and judgment reforming the deed as prayed was entered. There was no party to this action representing issue unborn, and therefore any future issue of the vendor would not be cut off by the action to reform the deed from claiming in the future their rights to the property.

Held that the vendor could not convey a marketable title to the real estate.

Cross v. Buskirk-Rutledge Lumber Co., 139 Tenn. 79, 201 S. W. 141. A will gave the wife of the testator a life estate in certain real property, and in the same instrument

gave the executors of the will a power of sale over the property. The executors sold the property in question to the vendor in the present action. The vendor contracted to give the defendants an apt and proper deed with covenants of general warranty. As the wife or her representative is not a party to this action, this action cannot bind her. So whether the title is good or not the most that the vendor can do is to give the defendant a title subject to future litigation, which would not be a marketable title.

Where the title depends upon the existence of a fact, which is not a matter of record, and the fact depends for its proof entirely upon oral evidence, the case must be very clear by the vendor to warrant the court in ordering specific performance.

Fredman, et al. v. Oppenheim, 187 N. Y. 101, 79 N. E. 841, 116 A. S. R. 595. Title by adverse possession clearly established, although by parol evidence, is a marketable title; and where it appears in an action to compel specific performance of a contract to exchange real estate that the plaintiffs have a record title, perfect except as to two defects, which were not considered on the appeal as they were not in the record, that they and their predecessors have had possession thereunder for a period of thirty-eight years, and that during that entire period no person has made any claim of ownership to the premises, other than those from whom the plaintiffs derived their title, a decree based upon a conclusion of law, that the plaintiffs have a good and indefeasable title

to the premises by adverse possession, is properly granted.

Wanser v. DeNyse, et al., 188 N. Y. 378, 80 N. E. 1088, 117 A. S. R. 871. In this case the purchaser bid in the property at a judicial sale, and had paid a part of the purchase price. Afterwards he found, upon examination, and produced affidavits which showed that the record title to said premises was not clear.

A person who in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly offered, has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable. In case the title to such real property is not marketable such fact is a defense to a motion to compel the purchaser to complete his purchase or to any other proceeding or action based upon such bid.

The following New York cases are cited because of their bearing on the question of marketable title:

In the case of *Fleming v. Burnham*, 100 N. Y. 1, 10, the court said, "A title open to reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would es-

pecially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact where the facts presented upon the application might be changed upon a new inquiry or are open to opposing inferences. There must doubtless be a real question and a real doubt. But this situation existing the purchaser should be discharged."

In *Heller v. Cohen*, 154 N. Y. 299, 306, the court in stating the rules applicable to an action for specific performance say: "To entitle a vendor to specific performance he must be able to tender a marketable title. A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused." (*Vought v. Williams*, 120 N. Y. 253, 257; *Shriver v. Shriver*, 86 N. Y. 575, 584; *Fleming v. Burnham*, 100 N. Y. 1.)

"So, where there is a defect in the record title which can be supplied only by resort to parol evidence and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract." (*Irving v. Campbell*, 121 N. Y. 353, *Holly v. Hirsch*, 135 N. Y. 590, 598.)

Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878, 48 L. R. A. (N. S.) 619. The existence of a rural

highway, extending across land conveyed by warranty deed of the form in common use, does not constitute a breach of the covenants usually contained in such deeds.

The following cases hold that the existence of a highway over a piece of land in a rural section is such an encumbrance on the land as to cause a breach of the covenants of warranty in a deed:

Kellogg v. Ingersoll, 2 Mass. 96; Hubbard v. Norton, 10 Conn. 422; Alling v. Burlock, 46 Conn. 504; Herrick v. Moore, 19 Me. 313; Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322; Butler v. Gale, 27 Vt. 739; Pritchard v. Atkinson, 3 N. H. 335; Haynes v. Stevens, 11 N. H. 28; Burk v. Hill, 48 Ind. 52; Beach v. Miller, 51 Ill. 206; Kellogg v. Malin, 50 Mo. 496; Copeland v. McAdory, 100 Ala. 553.

The following cases hold that the existence of such a highway over the land is not such an encumbrance as to cause a breach of the covenant of warranty:

Memmert v. McKeen, 112 Pa. St. 315; Patterson v. Arthurs, 9 Watts (Pa.) 152; Howell v. Northampton, 211 Pa. St. 284; Whitbeck v. Cook, 15 John. (N. Y.) 482; Huyck v. Andrews, 113 N. Y. 81; Hymes v. Estey, 116 N. Y. 501; 133 N. Y. 342, 344; Smith v. Hughes, 50 Wis. 620, 627; Kutz v. McKune, 22 Wis. 628; Pomeroy v. Chicago, 25 Wis. 641; Pick v. Rubicon, 27 Wis. 433, 442; Mead v. Hein, 28 Wis. 533, 537; Sabine v. Johnson, 35 Wis. 185, 201; Burbach v. Schweinler, 56 Wis. 386, 390; Milwaukee v. Strange, 63 Wis. 178, 183; McLennon v. Prentice, 85 Wis. 427, 434; Jordon v. Eve, 31 Gratt. (Va.) 1; Deacons v. Doyle, 75 Va. 258; Trice v. Kayton, 84 Va.

217; Patton v. Quarrier, 18 W. Va. 447; Barre v. Fleming, 29 W. Va. 314; James v. Jenkins, 34 Md. 1; Desvergers v. Willis, 56 Ga. 515; Newmyer v. Roush, 21 Idaho 106; Schurger v. Moorman, 20 Idaho 97; Harrison v. Des Moines, 91 Iowa 114; Stuhr v. Butterfield, 151 Iowa 736; Killen v. Funk, 83 Neb. 622.

The taking of a city lot for a highway differs from the taking of rural land in regard to the question of whether such taking is an encumbrance on the land as to cause a breach of the covenant of warranty. Smith v. Mellon, 116 Minn. 198.

Stuhr v. Butterfield, 151 Iowa 736, 130 N. W. 897, 36 L. R. A. (N. S.) 321. The fact that the board of supervisors had ordered the construction of a drainage ditch is held not to constitute the breach of a covenant against encumbrances in a deed to the land thereafter given.

This case distinguishes between highways and drainage canals on the one hand and railways on the other. A highway and drainage canals are a direct benefit to the land over which they flow and are essential to the complete enjoyment of the land, and therefore are not considered an encumbrance on the land. A railroad, on the other hand, is not of especial benefit to the land over which it runs, but is only of general benefit to the whole community. Therefore such a right of way for a railroad would be an encumbrance as would be a breach of a covenant of warranty in a deed.

Blanck v. Sadlier, 153 N. Y. 551, 47 N. E. 920, 40 L. R. A. 666. This was a case where property was

purchased at a public sale, subject to a mortgage, which by the terms of the mortgage was to be paid in gold. At the time of the purchase this provision was not known by the purchaser. The purchaser sued for the recovery of the purchase money that he had paid down, on the ground that the clause in the mortgage making the same payable in gold was an impediment on the title.

The court held that the absence in the contract of sale of the medium in which said mortgage was to be paid did not imply a contract to pay in any currency that was legal tender. Therefore such clause in the mortgage did not constitute a breach of the contract by being a defect in the title.

A strong dissenting opinion in this case was rendered which held that the absence of any provision in a contract as to the medium in which the purchase price of land or a mortgage is to be paid implied a contract that the same was to be paid in general legal tender currency. Therefore the vendor is not able to comply with the terms of the contract and the vendee should be allowed to recover.

Justice v. Button, et al., 89 Neb. 367, 131 N. W. 736, 38 L. R. A. (N. S.) 1. A trust deed placed upon the property to secure a debt constitutes a defect in the title, notwithstanding the fact that the statute of limitations have run, and that the land has been held by adverse possession for the length of time as provided by law. As against the title itself this would be sufficient to remove the defect, but the courts are more tender in applying the law of adverse possessions as

against trust deeds and mortgages given to secure debts.

A good title is one that can be sold to a reasonably prudent man who might desire the property, or a title that can be mortgaged to a person of reasonable prudence as security for the loan of money.

Baldwin v. Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489. While an encroachment on a public highway is a public nuisance which can never grow by prescription into a private right, yet there are cases where, when the use of a highway has been totally abandoned by the public and private rights have grown up in consequence of such abandonment, an equitable estoppel is created against the public to assert a right to the use of the highway, and is not an impediment on the title.

Where a deed has been given to secure the payment of certain promissory notes, and since the right to foreclose a mortgage is barred by the lapse of twenty years and since there has been no recognition of the deed as a subsisting lien, the existence of such a deed is not a cloud on the title of parties to whom the land was subsequently conveyed by the same grantor.

Gregory v. Knight, 50 Mich. 61. Long practical acquiescence as between the public and a private owner as to the true line of the latter's fence along the highway will bind the public.

Brewer v. Herbert, 30 Md. 301, 96 Am. Dec. 582. Where a contract is made for the sale of house and lot, and before the contract has been performed the house was accidentally burned down, this does

not create any defect in the title, and the same is no defense to an action on the part of the vendor for specific performance. The vendor is the trustee of the vendee for the property and the vendee is

the trustee of the vendor for the balance of the purchase money. The vendee has an insurable interest in the property and it is his fault if he has not the same protected by an insurance.

CHAPTER VI

REMEDYING DEFECTS IN THE TITLE

THE ACTION TO QUIET TITLE

- § 79. Quieting the Title.
- § 80. Equity Pleading and Practice—Modern Changes.
- § 81. Bill of Complaint—Statutory Provisions.
- § 82. Quieting the Title—Outstanding Tax Titles.
- § 83. Statutory Provisions—Parties Unknown Defendants.
- § 84. Substituted Service—Unknown Defendants Appointing Guardian Ad Litem.
- § 85. Parties Not to Be Joined as Unknown Defendants Unless Fifteen Years Have Elapsed.
- § 86. The Action to Quiet—Miscellaneous Michigan Decisions.
- § 87. Bill of Complaint to Quiet Title Because of Outstanding Tax Titles, Misdescription of the Premises, Failure to State the Marital Status of Certain Grantors, Containing Averments Necessary in the Case of Unknown Heirs, Legatees and Devisees.
- § 88. Decree Quieting Title Because of Outstanding Tax Titles, Misdescriptions of the Premises, Failure to State the Marital Status of Certain Grantors.
- § 89. Decree to Quiet Title—Cancel Land Contract.
- § 90. Effect of Decree.
- § 91. Bill of Complaint to Cancel Land Contract After Forfeiture.
- § 92. Bill of Complaint Form to Quiet Title—Cloud Created by Quit-Claim Deed by Vendee.
- § 93. Bill of Complaint to Quiet Title to an Easement.
- § 94. The Pleadings and Briefs in Late Michigan Cases, Notes.

§ 79. Quieting the Title.—An action to quiet title is the appropriate remedy to remove clouds on the title to real estate, to set aside and cancel deeds or other instruments of record which encumber or cloud the title; in short to eliminate the usual and ordinary defects which occur in the record title to real estate.¹

1. Security Investment Co. v. Miller, 159 Mich. 337; King v. Carpenter, 159 Mich. 337; Casgrain v. Prevoist, 205 Mich. 687; Farr v. Hammond, 134 Mich. 419; Day v. Childs, 204 Mich. 20; Grand Trunk Davey, 132 Mich. 173.
v. Fuller, 205 Mich. 486; Nesbitt v

The following principles in relation to this remedy are well settled:

(a) The action may now be brought by the plaintiff holding either legal or equitable title to lands whether in possession or not, against any other person not in possession. Under a former statute the action could not be maintained by one out of possession of the real estate, but the statute now in force authorizes the action by such person.²

(b) The plaintiff must, if he prevails, do so on the strength of his own title, and if he has none, he is not in a position to attack that set up by another, even though he be in possession.³

(c) Where the plaintiff claims a legal record title, and does not allege any fraud, accident, mistake, or other grounds of general equity jurisdiction, nor point out any impediment to their defense, in an action of ejectment which is already pending, a bill to quiet title will not lie, because the underlying reason which permits the action to quiet title to be filed against adverse claimants out of possession, is that they cannot be brought into court by the action of ejectment.⁴

(d) A bill to quiet title will be entertained on behalf of the legal owner when he is not in a position to force the adverse claimant into a court of law to test its validity, but when

2. "The powers and jurisdiction of the circuit courts and circuit judges in chancery in and for their respective counties, shall be co-extensive with the powers and jurisdiction of the courts and judges in chancery in England as existing on March first, eighteen hundred forty-seven, with the exceptions, additions, and limitations created and imposed by the constitution and laws of this state. Said Circuit Court in chancery shall also have jurisdiction and authority. * * *

To hear and determine suits instituted by any person claiming the legal or equitable title to lands, whether in possession or not,

against any other person not in possession, setting up a claim thereto in opposition to the title claimed by the plaintiff; and if the plaintiff shall establish his title to such lands, the defendant shall be decreed to release to the plaintiff all claims thereto."

Section 12302, 3 Comp. Laws 1915.

3. *Wilhelm v. Herron*, 211 Mich. 339; *Vincent v. Evans*, 165 Mich. 695; *Malliatt v. Vogel*, 125 Mich. 291; *Horton v. Helmholtz*, 149 Mich. 227, *Malliat v. Vogel*, 125 Mich. 291.

4. *Carpenter v. Dennison*, 208 Mich. 441; *Moody v. McComber*, 158 Mich. 209; *Berger v. Roe*, 179 Mich. 184; *Chandler v. Graham*, 123 Mich. 327

each party claims the legal title, and a court of law is already possessed of the case, and it is not alleged that either fraud, accident, or mistake has intervened to prevent the possessor establishing his title at law, equity will not interfere.⁵

(e) If the plaintiff claims by virtue of tax deed, he must show the validity of the proceedings on which the deed is based, including the mailing of all notices required by law in connection therewith, and the burden of proof is on him to show that every statutory step has been taken which the law requires, as the tax deed is not of itself *prima facie* evidence of title.⁶

(f) Where the bill of complaint shows that the defendant is in possession, equity will have no jurisdiction, the remedy being at law.⁷

(g) It does not matter how the plaintiff acquired title, whether by adverse possession or otherwise, if he holds either the legal or equitable title to the property, that is sufficient, nor does it matter whether the plaintiff took possession of said property under a color of title. If he has occupied the same for the full statutory period that will be sufficient.⁸

§ 80. *Equity Pleading and Practice—Modern Changes.*—The equity pleadings incorporated in this treatise have been studiously made as brief as possible to conform to the letter and spirit of the Judicature Act and of the Rules of the Supreme Court promulgated under that act, by virtue of which laws and rules it is provided that the pleading shall contain only a concise statement of fact without repetition, and that all equity pleadings shall be as brief as the case will permit, and shall not state facts of which the court takes judicial notice, nor any statement not required to be proved except where specially required by rule or statute.⁹

5. *Carpenter v. Dennison*, 208 Mich. 445.

6. *Taylor v. DeVoe*, 100 Mich. 581; *Dawson v. Peter*, 119 Mich. 610; *Morris v. Auditor-General*, 143 Mich. 610; *Vincent v. Evans*, 165 Mich. 695; *Morris v. Summer*, 164 Mich. 208.

7. *Seymour v. Rood*, 121 Mich.

173; *Doland v. Smith*, 147 Mich. 276; *Timken v. Piper*, 141 Mich. 95; *Warren v. Warren*, 151 Mich. 402; *Miscotten v. Helenthal*, 162 Mich. 402.

8. *Vier v. Detroit*, 111 Mich. 646; *Campau v. Lafferty*, 50 Mich. 114; *Horton v. Helmholtz*, 149 Mich. 227.

9. Sec. 2.—All pleadings must

It is further provided that no longer is it necessary to set forth a written instrument relied upon in the body of the pleading, but it shall be sufficient if a copy thereof shall be attached to the pleading as an exhibit, which exhibit shall be deemed a part of the pleading, and if the written instrument is one the form of which is prescribed by statute, it need neither be set forth in the pleading nor attached as an exhibit.

Other changes in equity pleading and practice are that the term "Solicitor in Chancery" has now become obsolete, the correct designation of all lawyers practicing before courts of record in this state is "Attorney and Counsellor."¹⁰

Replications have now been abolished.¹¹

contain a plain and concise statement without repetition of the facts on which the pleader relies in stating his cause of action or defense and no others. Each count or division of a pleading shall, so far as practicable, be divided into paragraphs consecutively numbered, each containing as near as may be, a separate allegation. Dates, sums, and numbers may be expressed in either figures or in words.

Sec. 3.—Pleadings shall be as brief as the nature of the case will admit and shall not state facts of which the courts take judicial notice, nor matters of evidence, and no pleading shall set forth any statement not required to be proved, except where specially required by rule or statute. Pleadings substantially similar to the forms annexed to these rules will be deemed suitable and sufficient, where the same are applicable.

Sec. 4.—In pleading a judgment, or the decision of a court or of an officer or a board of special jurisdiction, it shall be sufficient to allege generally that judgment or decision was duly given or made.

Sec. 5.—In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions on his part; if the allegations be denied, the facts showing performance must be proved on the trial.

Sec. 6.—Whenever a cause of action or defense is based upon a written instrument or document, the substance only of such instrument or document, shall be set forth in the pleading, and a copy thereof shall be attached to the pleading as an exhibit, which shall be deemed to be a part of the pleading, or said copy may with like effect be set forth in the pleading, provided that such copy need not be attached or set forth when the written instrument or document is one the form of which is prescribed by statute. Profert shall not be required. Michigan Circuit Court Rule No. 21.

10. Compiled Laws 1915, Section 12053.

11. Public Acts 1915, Chapter 14, Sec. 14.

In civil actions the term "Complainant" has been abolished and the term "Plaintiff" is now the correct designation of the moving party in an equity action.¹²

The term "Register in Chancery" has also been abolished and the county clerk discharges the function of the register of chancery, and his correct appellation is clerk of the Circuit Court.¹³

It is no longer necessary to pray for summons in the bill of complaint, as the plaintiff is entitled to process by rule of the court upon filing the bill of complaint.¹⁴ Neither is it necessary to incorporate in the bill of complaint an averment that the answer under oath of the defendant is waived, as such a requirement is automatically waived by failure to incorporate such a request in the bill of complaint.¹⁵

§ 81. Bill of Complaint—Statutory Provisions.—Whenever defendants are named in any suit or proceeding as the unknown heirs, devisees, legatees, and assigns of any person, or are included in any class of unnamed persons, the bill of complaint or petition shall be sworn to by the moving party, his agent or attorney, and shall state that the affiant does not know and has been unable after diligent search and inquiry to ascertain the names of the persons who are included as defendants therein without being named. Upon the filing of same an order shall be entered by the circuit judge of the county in which such proceedings are pending or by a circuit court commissioner of such county, for the appearance of every defendant in such suit or proceeding who cannot, by reason of being unnamed or otherwise, be personally served with process within three months from its date. If the suit is concerning lands every publication of such order shall be followed by a description of such lands as described in the bill of complaint, and a statement that the suit involves the title to such lands or is brought to quiet the title thereto.¹⁶

12. Compiled Laws 1915, Section 12352.

13. Compiled Laws 1915, Section 12148.

14. Michigan Circuit Court Rule No. 24.

15. *World Mfg. Co. v. Kent Circuit Judge*, 115 Mich. 652. Chancery Rule No. 25.

16. Compiled Laws 1915, Section 12375.

§ 82. **Quieting the Title—Outstanding Tax Titles.**—A fruitful source of defects in real estate titles are outstanding tax deeds and certificates. Unless there has been irregularities in the tax sale or in levying the tax relied upon by the plaintiff the owner of the land as a condition precedent to a decree quieting his title will be required to reimburse the holder of the tax deed for the amount of the tax together with interest from the date of such deed “under the maxim that he who seeks equity must do equity.”¹⁷ And if the invalidity of the sale is relied upon, the burden is on the plaintiff to allege and prove wherein the invalidity of the tax proceedings lies.¹⁸

17. *Legg v. Brower*, 212 Mich. 403.
In *Connecticut Mut. Life Ins. Co. v. Wood*, 115 Mich. 454, the court said:

“If, as in the present case, the taxpayer petitions the court in chancery in the auditor-general’s proceedings to foreclose a lien, the court will compel him to do equity. If the taxpayer is in possession, and files a bill to remove a cloud from the title, the court may then compel him to do equity.”

In *Axtec Copper Co. v. Auditor General*, 128 Mich. p. 620:

“The petitioner did not offer in its petition, nor during the progress of the trial in the court below, to reimburse the respondents for the amount paid by them to the state at the time of their purchase, and the decrees rendered by the court below did not require this to be done. In *Connecticut Mut. Life Ins. Co. v. Wood*, 115 Mich. at p. 454, it is said, in a like case to this: ‘If, as in the present case, the taxpayer petitions the court in chancery in the auditor-general’s proceedings, the court will compel him to do equity.’ See also, *Jenkinson v. Auditor-General*, 104 Mich. 34; *McGinley v. Mining Co.*, 121 Mich.

88. In his supplemental brief in this court, counsel offers to pay the respondents the amount paid by them at the time of their purchase, with interest, if the court deem it equitable and right. We think the petitioner ought to be required to do this before the decrees are vacated and when it is done, that the decrees should be vacated.”

To the same effect is *Horton v. Salling*, 155 Mich. 506.

In *Morrison v. Semer*, 164 Mich. 211, the court said:

“There having been no evidence offered, however, in support of the charge of the bill of complaint showing the invalidity of the taxes for those years, the court held that in accordance with the maxim that he who seeks equity must do equity, and this being a bill of complaint to quiet title, the complainants should be required to repay these taxes as a condition of relief, citing *Croskery v. Busch*, 116 Mich. 289.”

In *Vandervelde v. Wilson*, 176 Mich. 191, “He who asks equity must do equity.”

18. *Morrison v. Semer*, 164 Mich. 208.

Where the purchaser of a tax title went into possession without serving the statutory notices to redeem, he was not entitled to compensation for improvements made or taxes paid while he was in wrongful possession.¹⁹

Where payments are made upon tax titles which are void, they will be deemed voluntary and recovery will not be permitted in a direct action brought for that purpose,²⁰ but on a bill to quiet title payment of the tax and interest will be required of the plaintiff as a condition precedent to granting relief.

In a case where the auditor general of the state has refused to issue a deed where the plaintiff had tendered to him the correct amount of unpaid tax necessary to redeem the property, he is a proper party in an action to quiet the title, and this is true even where the auditor general has sold the property, but through irregularities in the sale, the same is void.²¹

One claiming to be the absolute owner of lands under a tax title cannot lay the foundation for a suit to quiet title against the former owner by alleging a demand upon and a refusal to disclaim any interest in the property by such former owner.²²

§ 83. Statutory Provisions—Parties Unknown Defendants.—In all suits and proceedings in chancery, if there be any person interested in the same or in the subject matter involved therein, or whose name appears in the records of any public office as having at any time claimed any right, title, interest or estate in the subject matter of the suit or any portion thereof or any lien or charge thereon without having conveyed or released the same, or who might at any time under the provisions or legal effect of any instrument of record claim or be entitled to claim any benefits thereunder, and it is not known whether such person is living or dead, or where he may reside if living, or whether the title, interest, claim, lien or possible right has

19. *Morrison v. Semer*, *supra*;
Corrigan v. Hinkley, 125 Mich. 125;
Taylor v. Roniger, 147 Mich. 99;
Cook Land Co. v. McDonald, 155
Mich. 175.

20. *Morrison v. Semer*, *supra*;
Croskery v. Bush, 116 Mich. 288;

Corrigan v. Hinkley, *supra*; *Bate-
son v. City of Detroit*, 143 Mich. 582

21. *Horton v. Helmholtz*, 149
Mich. 231.

22. *Triangle Land Co. v. Nessen*,
155 Mich. 463.

been by him assigned to any person or persons, or if dead whether he has personal representatives or heirs living or where they or some of them may reside, or whether such title, interest, claim, lien or possible right has been disposed of by will, it shall be lawful to make such person and every one claiming under him defendants in such suit or proceeding by naming such person and adding the words "or his unknown heirs, devisees, legatees, and assigns," which shall include and be construed to include all persons claiming in any manner under the person named as originally interested in such subject matter. If the subject matter be real estate, such addition shall include and be construed to include all persons who might claim under the person named any dower or homestead right, whether the same shall be vested or inchoate at the time of beginning suit, or proceeding. In all suits and proceedings in chancery, if there be persons interested in the same, as heirs of some person or persons deceased, whose names are unknown, it shall be lawful to make such unknown heirs parties defendant to such suit or proceeding by the name and description of unknown heirs of such deceased person.²³

§ 84. Substituted Service—Unknown Defendants Appointing Guardian Ad Litem.—All subsequent proceedings including publication of said order shall be taken in the same manner and with like effect as though all defendants were named therein by their proper names, and as to unnamed defendants and such as are not known to be living shall be in conformity with the statutes relating to defendants who reside in another state, provided that a guardian or guardians ad litem shall be appointed in accordance with the rules and practice of the court in the case of incompetent persons, to represent all unknown or unascertained defendants, and all known defendants who are infants or incompetent, provided further that the court before which said cause is heard, on a proper showing by affidavit that one or more of the defendants did not have actual notice of said suit in time to appear and defend the same, may in its discretion, at any time, not later than three years after

²³. Compiled Laws 1915, Section 12371.

the entry of the final decree, reopen said case and order a re-hearing as to the rights of such defendants or defendants who shall serve a copy of such affidavit and order and notice of all subsequent proceedings in the case on the plaintiff or his attorney and on all defendants who appeared on the original hearing or their attorneys.²⁴

§ 85. Parties Not to Be Joined as Unknown Defendants Unless Fifteen Years Have Elapsed.—Whenever suit is brought under the provisions of sections twenty to twenty-seven, inclusive, of this chapter to quiet the title to real estate, no one whose actual or possible title, claim, or lien, is sought to be removed or construed, and whose name appears of record in some public office in connection therewith, may be made defendant in accordance with the preceding sections, except under his proper name or the name appearing in such record, nor shall his unknown heirs, devisees, legatees and assigns be included as defendants therein, unless fifteen years have elapsed since the recording of such title, claim or lien. When any one against whom proceedings under sections twenty to twenty-seven, inclusive, of this chapter might otherwise be brought is known to be dead, and some of the persons who might claim under him and their places of residence are known, such of them as are known shall be named as defendants and brought before the court in the manner provided by law, and all others who might claim under such deceased person may be included as unknown defendants.²⁵

§ 86. The Action to Quiet Title—Miscellaneous Michigan Decisions.—Where a vendee, after the forfeiture of a land contract, encumbers the record with a quit-claim deed to third parties, a suit to quiet the title will lie.²⁶ Also quieting the title is the appropriate remedy to legally establish an easement consisting of the right to overflow a certain land for the purposes of a mill race.²⁷ Where the plaintiff seeks equitable relief, the court having acquired jurisdiction, has the right to

24. Compiled Laws 1915, Section 12376.

25. Compiled Laws 1915, Section 12373.

26. Security Investment Co. v. Meister, 214 Mich. 337.

27. Moore v. Prevost, 205 Mich. 687.

enter a decree for the defendant quieting his title to the property upon his cross bill.²⁸ The bill of complaint to quiet title may, at the same time, seek equitable injunctive relief to restrain actions at law, such as ejectment, pending the determination of the suit.²⁹ Where the bill of complaint to quiet title to lands, alleged adverse possession without also alleging that such possession was exclusive, it was held that the bill was sufficient.³⁰

A bill to quiet title was sufficient for relief where it alleged the execution of certain deeds conveying premises to plaintiff upon conditions that he pay certain sum of money to each defendant and that defendants had refused to accept the money, and that they asserted the mental incompetency of the grantor, and threatened to litigate with the plaintiff.³¹

In a suit to quiet title, a decree of the circuit court establishing the validity of a certain tax, a deed based thereon could not be attacked collaterally, because of a change in the description, of the premises authorized by a certain statute.³²

A grantee, agreeing to care for the mother of the grantor in a deed, was not entitled until he had completed his contract, to assert his rights by the commencement of a suit to quiet his title against creditors that had levied execution on the legal title of the debtor.³³

Where plaintiff, who had been ousted by defendant, brought suit to quiet title, it was held that he should have been required to pursue his remedy at law, as possession is a necessary element in such a suit.³⁴

A defendant cannot, in his cross bill, question the validity of the deed to plaintiff on the ground that plaintiff had secured the deed by fraud, as the right to complain of any fraud is nonassignable.³⁵

28. *Farr v. Childs*, 204 Mich. 20.

32. *Heethuis v. Kerr*, 194 Mich. 689.

29. *Grand Trunk v. Fuller*, 205 Mich. 486.

33. *Schmidt v. Steinbach*, 193 Mich. 640.

30. *Corby v. Thompson*, 196 Mich. 706.

34. *Longear v. Turner*, 191 Mich. 240.

31. *Guntzviller v. Gitre*, 195 Mich. 695.

35. *Cochran Timber Co. v. Fisher*, 190 Mich. 478.

The burden of proof is on the plaintiff to show a valid title, and service of a proper notice, and where notice was served on the heirs of a deceased, as to one the day after filing of the bill, and as to the other only a few days before commencement of suit, so that the return of service was not filed until after suit was begun, was not sufficient to confer jurisdiction to quiet title.³⁶

Courts of equity may pass upon or locate boundary lines as an incident of issues properly within chancery jurisdiction, but they have no inherent and independent jurisdiction to determine the true location of disputed boundaries raised in a suit to quiet title.³⁷

A court of equity has jurisdiction to enjoin repeated trespasses upon lands, yet it is not authorized to try defendant's right to possession of real property of which he claims actual possession and title, evidenced by acts of control and occupancy, and the title to the land should be determined at law.³⁸

Defendants in a suit to quiet title were in not position to object to the jurisdiction of the court of chancery when they had filed a cross bill asking for affirmative relief and the annulment of a deed to plaintiff as fraudulent.³⁹

As against parties in possession of real property under a claim of title, a bill to quiet title will not lie; the remedy is at law.⁴⁰

A bill was filed to quiet title to a strip of land which defendant claimed title to by adverse possession, relying on an old fence which had fallen into decay, the fence not having been continuously maintained on a large part of the strip of land in dispute, it was held that defendant did not acquire title by adverse possession.⁴¹

Where a bill to quiet title was filed, to remove a cloud consisting of a tax deed, alleging that defendant did not serve the required statutory notice to redeem on the proper parties, it was dismissed as the parties had a remedy at law.⁴²

36. *Bretz v. Hitchcock*, 188 Mich. 492.

37. *Weissert v. Fuller*, 188 Mich. 327.

38. *Beach v. Rice*, 186 Mich. 95.

39. *Hummill v. Smale*, 186 Mich. 199.

40. *Lachelt v. McInerney*, 185 Mich. 413.

41. *Conner v. Detroit Terminal R. R. Co.*, 183 Mich. 241.

42. *Holmes v. Soule*, 180 Mich. 527.

Although plaintiffs in their bill to quiet title to land prayed to have a conveyance cancelled as a cloud on their title, on the ground of fraud and duress, and of mental incompetency on the part of the grantor deceased, it was held that the case presented one for equitable cognizance.⁴³

A bill in equity to quiet title, which does not aver that plaintiffs are in possession or the defendants are not in possession, is demurrable, for if the defendants are in possession, they are entitled to a jury trial.⁴⁴

Where defendants filed a petition following a decree based on substituted service, presenting at the same time their answer to the bill which sought to quiet title to land asking that the decree be "set aside, altered or amended, as to the court may seem just," it was held that the circuit court erred in denying the petition on the ground that it did not ask in direct terms to have the default set aside and that defendants did not present a sworn answer.⁴⁵

In a bill to quiet title by a widow which showed that she had executed during her husband's lifetime her sole quit-claim deed of property held by her and her husband as an estate by the entireties, to secure a loan, the court held that the wife conveyed no interest in the premises, nor did title inure to the benefit of the grantee by reason of the husband's death and the title thereafter acquired by the wife.⁴⁶

On appeal by plaintiffs from an adverse decree in a suit to quiet title, the Supreme Court will not pass on the constitutionality of a statute and dismiss the bill at plaintiff's request, if the point was not presented or passed upon by the trial court.⁴⁷

Where equity has jurisdiction of a bill to quiet title to lands purchased by plaintiff at a judicial sale that was void and defendants offered to pay to plaintiff the consideration paid by him, equity will retain jurisdiction and remove the cloud in

43. *Lecus v. Turns*, 180 Mich. 117.

44. *Berger v. Roe*, 179 Mich. 184.

45. *McDowell v. Mecosta Circuit Judge*, 178 Mich. 103.

46. *Ernest v. Ernest*, 178 Mich. 100.

47. *Walker v. Schultz*, 175 Mich. 280.

defendant's title, setting aside the purchaser's deed and decreeing a lien on the property for the amount paid.⁴⁸

Where plaintiff notified defendant of her election to termination of the contracts for default, plaintiff was entitled to maintain a suit to quiet title, although she had subsequently contracted to convey to other purchasers and defendant, after notice of forfeiture, tendered a check for the purchase price which she refused.⁴⁹

A bill to quiet title to land held by plaintiffs intestate under a land contract, which he averred had been fully paid up, the defendants claiming no interest therein, also charging adverse possession for upwards of twenty-five years could not be sustained on demurrer, as a suit to quiet title; averment of some claim or hostile interest being essential.⁵⁰

In a suit to quiet title by the owner of land as against a purchaser for taxes, the plaintiff will be required to do equity by refunding, as a condition to relief, the validly assessed taxes for years which defendant has purchased.⁵¹

One must have either a legal or an equitable title if he is to be allowed relief upon a bill to quiet title, though an equitable title is sufficient.⁵²

Although not in possession a bill to quiet title may be filed by an heir to set aside a deed in trust which is void as prohibited by the statute against perpetuities.⁵³

A bill to quiet title will not lie to remove a cloud caused by an irregular levying of an execution on land, the remedy being an application to the court wherein the judgment was rendered.⁵⁴

A bill will lie to remove a levy upon a homestead,⁵⁵ and such a bill may be maintained by the wife of the debtor,⁵⁶ the wife

48. *Hunt v. Stevens*, 174 Mich. 501.

49. *Donnelly v. Lyons*, 173 Mich. 515.

50. *Rodgers v. Beckel*, 172 Mich. 544.

51. *Morrison v. Semer*, 164 Mich. 208.

52. *Harton v. Helmholtz*, 149 Mich. 227.

53. *Casgrain v. Hammond*, 134 Mich. 419.

54. *Rhode v. Hassler*, 113 Mich. 56.

55. *Hitchcock v. Misner*, 111 Mich. 80.

56. *Burkhardt v. Walker & Son*, 132 Mich. 93.

having the same right to protect the homestead as the husband.⁵⁷

§ 87. Bill of Complaint to Quiet Title Because of Outstanding Tax Titles, Misdescription of the Premises, Failure to State the Marital Status of Certain Grantors, Containing Averments Necessary in the Case of Unknown Heirs, Legatees and Devisees.

(Caption, Address and Introduction.)

The plaintiff herein (here insert the name of plaintiff), complains of the defendants herein (here insert the name of defendants), and for a cause of action alleges:

1. That this plaintiff does not know, and has been unable, after diligent search and inquiry, to ascertain the names of the following persons who are included and designated as defendants herein, to-wit: (here state unknown heirs, devisees, legatees, and assigns of each of the following named persons): (here name all of the persons whose unknown heirs, devisees, legatees and assigns are made parties to the action).

2. That this plaintiff is the owner, in his own right and in fee simple, of all that certain piece or parcel of land, more particularly described as follows: (here describe real estate), and that the same is of the value of \$.....and upwards.

3. That on the.....day of....., A. D. 19....., the above described real estate was sold and deeded by the Auditor General of the State of Michigan, for the state and county taxes for the year....., to....., which outstanding deed appears regular on its face and constitutes a cloud on this plaintiff's title.

4. That plaintiff stands ready and willing to pay, and hereby tenders the amount of such taxes together with the amount of interest which may have accrued thereon at the legal rate, and stands ready and willing to pay such other costs, charges, and disbursements to the vendee of said tax deed, as may seem to the court just and equitable in the premises.

5. It appears from the records on file in the office of the register of deeds of.....county, that on the.....

57. *Armitage v. Toll*, 64 Mich. 412.

day of....., one John Doe conveyed said real estate to Richard Roe; that such deed does not recite the marital status of the grantor, and by reason of the fact that there is no evidence of record as to the said John Doe's marital status, prospective purchasers of said real estate fear that some dower interest in the wife of the said John Doe, if he had one, may be outstanding; that at the time the said John Doe executed said conveyance he was in fact an unmarried man; that said defect constitutes a cloud on plaintiff's title, and tends to embarrass plaintiff in the sale of said property.

6. That on the.....day of....., one..... and his wife....., executed and delivered a deed for said property to this plaintiff, through which grantors this plaintiff claims title, in which deed said property was erroneously described as follows: (here insert erroneous description). That such erroneous description of such property constitutes a cloud on plaintiff's title and tends to embarrass the sale thereof.

Wherefore Plaintiff Prays:

(a) That he may be permitted to redeem from said tax sale. That upon the payment of said tax together with the legal rate of interest and all just expenses paid out and disbursed by the said plaintiff....., that the defendants be required to execute to this plaintiff a quit claim deed, conveying all his right, title, and interest in and to the above described premises. That upon failure of said defendants to execute a quit claim deed as aforesaid, this plaintiff shall have permission to record this decree. That the same shall stand as a full, complete, and adequate conveyance of the said defendants' claims in and to said property.

(b) That the court finds the fact to be and will enter a decree accordingly that John Doe, the defendant above named, was an unmarried man at the time said conveyance was executed and that the unknown heirs, devisees, legatees, and assigns of John Doe have no right, title, and interest in and to said real estate, and that plaintiff's title thereto is quieted to said real estate as against all said defendants and that the decree entered in this cause shall stand as an absolute conveyance of

each and all the respective defendants' interest in and to said property to this plaintiff.

(c) That plaintiff shall have such other, further, and different relief in the premises as shall be agreeable to equity and good conscience. -----

Attorney for Plaintiff.

§ 88. Decree Quieting Title Because of Outstanding Tax Titles, Misdescriptions of the Premises, Failure to State the Marital Status of Certain Grantors.

(Caption. Usual recital of time and place of court.)

This cause having come on to be heard upon the bill of complaint taken as confessed in said cause, and the court having heard the evidence for the plaintiff, and having duly considered the same, and being fully advised of the premises finds the facts to be as follows:

1. That the defendant A. B. is an owner and holder of a certain tax deed upon which he has paid the taxes in the sum of.....dollars, plus the sum of.....dollars costs and expenses in connection with procuring said tax title and that there is due accrued interest thereon for years, making the total of dollars due the said A. B. upon said tax title.

2. That it is just and equitable that the plaintiff be permitted to redeem said outstanding tax title from the said A. B. upon the payment of said sum of.....dollars to the clerk of this court, and it further appears that plaintiff has deposited with the clerk of this court for the purpose of redeeming from said tax sale said sum of.....dollars, the court further finds:

3. That C. D., the above mentioned defendant, at the time he made a conveyance of said property as hereinbefore described was an unmarried man and that no surviving spouse or widow of the said C. D. has any right, title, interest in and to said real estate.

4. The court further finds that on the.....day of, when the above named defendants.....and executed a deed to said premises, that by such deed said defendants intended to convey to the plaintiff the identical

property described in plaintiff's bill of complaint, to-wit: (here insert the description of property), but that said property was erroneously described in the following manner: (here insert the erroneous description); that upon the execution and delivery of said deed the said plaintiff took possession of the property, has held the same exclusively, openly, notoriously, and adversely as against all of said defendants for a period of fifteen years and more, and that said plaintiff is now the owner in fee simple of said property and has a perfect title against all defendants; that the claims of said defendants constitute clouds upon plaintiff's title and that plaintiff's title ought to be quieted against all of said defendants.

It Is Therefore Considered, Adjudged and Decreed and the court doth hereby order, adjudge and decree that said tax deed issued by the Auditor General of the State of Michigan to A. B. dated the.....day of....., recorded in liber, page.....of.....in the office of the register of deeds of.....county is hereby cancelled, annulled and set aside and the said defendant A. B. is hereby decreed to have no right, title, and interest in and to the above described real estate by virtue of said deed, and the title of said plaintiff.....is hereby decreed to be perfect as against the said defendant.

It Is Further Ordered, Adjudged and Decreed that no surviving spouse or widow of the said A. B. had any right, title, or interest in and to the said real estate; that the title of plaintiff is perfect as against the unknown heirs, devisees, legatees, and assigns of the said A. B.

It Is Further Ordered, Adjudged and Decreed that said defendants (here name the defendants who had the legal title to the real estate at the time the deed was made containing the erroneous description of the real estate to the plaintiff); that the above named defendants had no right, title, or interest in and to said real estate and that the plaintiff has a title in fee simple, perfect as against said defendants; and that the plaintiff have leave to cause this decree or a certified copy thereof to be recorded in the office of the register of deeds of said county of.....

.....
Circuit Judge.

§ 89. Decree to Quiet Title—Cancel Land Contract.

(Caption. Recital of time and place of court.)

This cause having come on to be heard on the pleadings therein and the proofs taken in said cause and having been argued by counsel for respective parties and the court having duly considered same, being fully advised in the premises, finds:

1. That the land contract referred to and described in plaintiff's bill of complaint, being recorded in liber....., page in the office of the register of deeds of..... county, constitutes a cloud upon the plaintiff's title, that the same has been duly forfeited and that the plaintiff has repossessed himself of the premises described in said bill of complaint and that the vendees in said land contract no longer have any right title or interest in and to said premises.

It is therefore ordered, adjudged and decreed and the court doth hereby order, adjudge and decree that the land contract executed on the.....day of.....by the plaintiff as vendor and.....defendants as vendees, recorded in liber....., page.....of.....in the office of the register of deeds of.....county is null, void and of no effect, that said defendants.....have no right, title and interest in and to said real estate and that the plaintiff's title is hereby quieted against said defendant's and that the plaintiff is the owner of said land and premises in fee simple by title perfect as against the defendants in this suit and that the plaintiff have leave to cause this decree or a certified copy thereof to be recorded in the office of the register of deeds for the said county of.....

.....
Circuit Judge.

§ 90. Effect of Decree.—On the hearing of any such suit or proceeding, if the allegations of the bill or petition are proven to the satisfaction of the court, and if it shall appear that the claims or possible rights of the defendants on the subject matter of the suit are of no validity and ought to be barred, the court shall decree accordingly; or if there are valid liens existing, or possible, uncertain or doubtful conditions to be con-

strued, it shall make a decree determining their nature, validity or extent which shall determine the rights of all parties plaintiff or defendant, and shall be effectual to exclude all parties to such suit contrary to such determination, and shall have the same effect as a release by the holder thereof of every actual or possible claim which such decree shall find to be without validity and if the effect of such decree is to quiet the title to lands, or if it in any way concerns the title to real estate, a certified copy thereof may be recorded in the office of the register of deeds of any county where said lands or any part of the same are situated. The court may award costs in its discretion.⁵⁸

§ 91. Bill of Complaint to Cancel Land Contract After Forfeiture.

(Address and introduction.)

1. That plaintiff is the owner in his own right and fee simple to the following described real estate, to-wit: (here insert complete legal description), and has been the owner of such real estate for.....years last past and that the value thereof is.....dollars.

2. That heretofore on or about the.....day of.....while plaintiff was such owner as aforesaid, plaintiff made and executed a contract in writing with one John Doe for the sale of said land and premises, a true copy of said contract being as follows: (here insert copy of contract).

3. That thereafter on the.....day of.....the said John Doe caused the said contract to be recorded in the office of the register of deeds of said county of.....in liber.....of.....on page.....as in and by the record thereof now remaining in said register's office and whereto reference is prayed.

4. That thereafter on or about the.....day of....., the said John Doe having made default in the terms and conditions of said contract in writing and having failed to make the payments thereon as provided therein, this plaintiff in accordance with the terms and conditions of said contract elected

⁵⁸. Compiled Laws 1915, Section 12378.

to declare the same void by reason of such default and thereafter resumed full possession of said land and the whole thereof and still is in possession thereof. That plaintiff thereafter applied to the said John Doe and requested him to execute a release in writing of the said agreement in order that the same might be cancelled, which request the said John Doe refused and still refuses.

5. That the record of said agreement constitutes a cloud on the title to said plaintiff of said land and premises and tends to depreciate the value thereof and to embarrass this plaintiff in effecting a sale thereof.

Wherefore plaintiff prays as follows:

(a) That said contract in writing may be decreed to be null and void and a cloud upon the title of this plaintiff to the said land.

(b) That the record of said agreement now remaining in the office of the register of deeds, aforesaid, be decreed to be discharged and to be null and void and of no effect.

(c) That plaintiff have leave to cause such decree to be recorded in the office of the said register of deeds for the county of.....

(d) That plaintiff may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

Attorney for Plaintiff.

§ 92. Bill of Complaint Form to Quiet Title—Cloud Created by Quit-Claim Deed by Vendee.—The following is a form of a bill of complaint to quiet the title to real estate where the vendor has forfeited a land contract and repossessed himself of the premises, the cloud on the title consisting of a quit-claim deed by the vendor of the land contract to some third party.

State of Michigan, in the Circuit Court for the County of _____, in Chancery; to the Circuit Court for the County of _____, in Chancery:

The plaintiff, herein, John Doe, of the City of Detroit, county of _____, and State of Michigan, complains of the de-

fendant herein (here join as defendants original vendee, his vendee, and their spouses), and respectfully shows unto this Honorable Court as follows:

1. That this plaintiff is the owner of (here state either legal or equitable title, as the case may be) in and to the following described real estate to-wit: (here insert complete legal description of the real estate), and further that neither of the above mentioned defendants are in possession of said premises or any part thereof.

2. That on the.....day of....., A. D. 19..... the said defendants entered into a contract with the plaintiff whereby the plaintiff contracted to sell, and the said defendants contracted to buy the above described real estate for a certain valuable consideration therein named, a true copy of such contract being hereto attached, marked Exhibit "A," and made a part thereof, reference to which is hereby prayed.

3. That by the terms and conditions of said contract the said defendants had agreed to pay monthly installments thereon amounting to \$.....; that said contract contained a clause providing that in the event the said defendants failed, neglected, or refused to comply with the terms of such contract, that this plaintiff and the vendor thereof might declare such contract forfeited, retain all payments made thereunder as liquidated damages and repossess himself of the premises.

4. That on the.....day of....., A. D. 19....., certain payment had become due on the said contract which the defendants had wholly failed, neglected, and refused to pay, although repeatedly demanded from them by this plaintiff, such payments in the aggregate amounting to \$..... (here state details of the indebtedness accrued on the contract, that although this plaintiff often requested defendants to keep up their payments and covenants in said contract, they utterly failed and neglected so to do; that on the.....day of.....A. D. 19....., this plaintiff served upon them a formal notice declaring said contract forfeited; that said notice was duly followed by summary proceedings begun by this plaintiff before (here state officer before whom summary proceedings were begun), and that said proceedings terminated in

a judgment duly rendered by said commissioner that plaintiff have judgment of restitution of said premises on the..... day of....., A. D. 19....., all of which reference to the files and records of said commissioner's court, file No....., is hereby prayed, which said writs were on the..... day of..... A. D. 19....., recorded with the register of deeds of..... county, Michigan, in liber....., page....., reference to which is hereby prayed.

5. That after the plaintiff had repossessed himself of the said premises as hereinbefore set forth, to-wit, on the..... day of....., A. D. 19....., said defendants, for the purpose of embarrassing this plaintiff and casting a cloud on the title to said real estate, executed a quit claim deed to (here state vendee of the vendee), for the above described premises, which deed has been recorded in liber..... in the office of the register of deeds of..... county.

6. That said quit-claim deed thus executed by the defendants constitutes a cloud upon the title of this plaintiff to said lots.

7. That plaintiff is wholly without adequate remedy except in a Court of Equity.

Wherefore plaintiff prays:

(a) That said quit-claim deed above described may be decreed to be null and void and of no effect whatsoever as against the title of this plaintiff and that the same be delivered up to be cancelled.

(b) That the said defendants (here name them), be decreed to have no right, title, or interest in and to the above described real estate, either by virtue of said land contract or said quit-claim deed.

(c) That the plaintiff may have permission to record the decree which may be entered in said cause, and that such decree, when recorded, shall stand in effect as a cancellation of said deed, and as a bar against any of said defendants asserting title in and to said real estate.

(d) That plaintiff may have such other, further, and different relief as shall be agreeable to equity.

Plaintiff.

Attorney for Plaintiff.

State of Michigan, }
County of.....} ss.

John Doe, being first duly sworn, deposes and says that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein alleged to be on information and belief, and as to those matters, he believes it to be true.

Subscribed and sworn to before me this.....day of
....., A. D. 19.....

Notary Public, Wayne County, Michigan.

My commission expires.....

§ 93. Bill of Complaint to Quiet Title to an Easement.—The following form of bill of complaint may be used to quiet the title to an easement consisting of the right to overflow certain lands for the purposes of a mill dam.

State of Michigan, in the Circuit Court for the County of
....., in Chancery; to the Circuit Court for the County
of....., in Chancery:

The plaintiff herein, John Doe, of the City of, County
of....., and State of Michigan, complains of the defend-
ants herein (here name as defendants all persons who claim
any interest in the property), and respectfully shows unto this
Honorable Court as follows:

1. That upon, to-wit: the.....day of....., A. D.
19..... (here state the date that the easement was first estab-
lished), Richard Roe was the owner of the following described
real estate, to-wit: (here insert complete legal description of
the real estate).

2. That on or about said date, a certain mill for the purpose
of grinding flour, commonly known as a grist mill, was located
upon said premises; that a portion of said land was used in
the regular business of operating said mill, and the remaining
portion thereof was used for the purpose of damming up the
water thereon, for the purpose of maintaining a dam across
the.....river, which dam was used for the purpose of

furnishing power to operate said mill; that said dam was first constructed on or about the.....day of....., and from the date of the construction of said dam as aforesaid, the same mill has been operated continuously, and that all of the above described real estate has been continuously overflowed by the waters which have been impounded for the purpose of operating said mill by means of the power arising from said dam.

3. That the said John Doe and his assigns, including this plaintiff, have occupied said lands for the purpose of a mill race continuously, openly, and adversely, for a period of forty years, and have thereby acquired an easement upon said lands, which easement consists in the right of this plaintiff to overflow said lands for the purposes of said mill race.

4. That this plaintiff has acquired title to said easement in the following manner: (here state plaintiff's chain of title, describing briefly the conveyances, if any, to which plaintiff claims title).

5. That the defendants herein, who are the owners of the fee encumbered by such easement, are claiming that this plaintiff does not have the right to overflow such lands, and are circulating statements in and about the neighborhood to this effect, and further that certain of such defendants, (here insert their names), have conveyed certain parcels and tracts of real estate covering the property which is servient to such easement (here describe such conveyances, giving legal description of the property, date of conveyances and to whom same are made), and in such conveyance have warranted that such real estate was free and clear from all encumbrances, which statements and conveyances cast a cloud on the right of the plaintiff to use and enjoy such easement, and tends to embarrass plaintiff in effecting a sale of said property, as the enjoyment of said easement to overflow said lands is absolutely essential to the operation of said mill, and if the plaintiff's title is defective in respect to such easement, it would be impossible for plaintiff to effect a sale of said mill property.

6. That plaintiff has no adequate relief except in a court of equity.

Wherefore plaintiff prays that a decree be entered quieting title of this plaintiff in and to the easement consisting of the right to overflow said land in the manner and to the extent hereinbefore described and further decreeing that this plaintiff is the owner of such easement and that all of said defendants have no right to interfere with plaintiff's full and complete enjoyment of such easement.

(a) That said defendants be permanently enjoined from interfering with plaintiff's enjoyment of such easement.

(b) That plaintiff may have such other, further, and different relief in the premises as shall be agreeable to equity and good conscience.

Plaintiff.

Attorney for Plaintiff.

State of Michigan, }
County of..... } ss.

John Doe, being first duly sworn, deposes and states that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters, he believes it to be true.

Subscribed and sworn to before me this.....day of
....., A. D. 19.....

Notary Public, Wayne County, Michigan.

My commission expires.....

§ 94. The Pleadings and Briefs Used in Late Michigan Cases in Actions to Quiet Title.

SECURITY INVESTMENT CO. v. MEISTER, 214 Mich., 337.

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Exhibit "2," The Contract Relied Upon.
- (d) Answer and Cross-Bill.
- (e) Decree.
- (f) Authorities Cited by Plaintiff. Brief for Plaintiff.
- (g) Authorities Cited by Defendant. Brief for Defendant.

THE PLEADINGS AND BRIEFS USED IN LATE MICHIGAN CASES IN ACTIONS TO QUIET TITLE

SECURITY INVESTMENT CO. v. MEISTER, 214 Mich., 337.

(a) Brief Statement of Fact.—This was a suit brought to quiet title to certain land, which had been purchased on land contract by the defendant Meister, and quit-claimed to defendant Lefton, after the plaintiff had obtained possession of the land by summary proceedings, the defendant Meister having defaulted in his payments and plaintiff had declared the contract forfeited. It is the contention of Meister that he should be re-instated on the land contract or an accounting and refund made to him. The decree granted a re-instatement and specific performance to defendant Meister, and on appeal was reversed, the court holding defendants to have no interest or equity in the land.

(b) Bill of Complaint.

STATE OF MICHIGAN

In the Circuit Court for the County of Wayne.
In Chancery.

Security Investment Co.,	} No.
a Michigan Corporation,	
Plaintiff,	
vs.	
Saul H. Meister and	
Julius Lefton,	
Defendants	

The Security Investment Company, a Michigan Corporation, by Daniel R. Foley, its attorney, respectfully represents:

1. That it has an equitable title in and to certain premises situated in the Village of Ecorse, Wayne County, Michigan, known and described as Lots 15-16-17 and 18 of the Moore & Veale's subdivision of the south part of the Lot 2 of the Jonas Goodell Estate, subdivision of private claim 226 according to a plat thereof recorded in Liber 32 page 73 of plats, Wayne County, Michigan Records; and further that neither of the above mentioned defendants is in possession of said premises, nor any part thereof.

2. That the legal title to said premises was formerly in Cleophus T. Goodell and Philomene Goodell, his wife, but that on December 24th, 1915, the said Cleophus T. Goodell died and the legal title to the said premises is now held by the said Philomene Goodell and the heirs-at-law of the said Cleophus T. Goodell.

3. That on the sixth day of May, 1915, the said Cleophus T. Goodell gave a land contract for the said premises together with other land to the Moore & Veale Real Estate Corporation, a Michigan corporation, which said land contract is still in full force and effect and is in no way questioned by the parties thereto nor by their heirs, representatives,

or assigns. A copy of which said contract is hereto appended and made a part hereof, marked Exhibit "A," to which reference is prayed.

4. That by an assignment dated the fourth day of December, 1916, the said Moore & Veale Real Estate Corporation duly transferred all its right, title and interest in and to said premises together with other lands by virtue of said land contract above mentioned as Exhibit "A," unto the Security Investment Company, plaintiff herein. That said assignment is still valid and subsisting and in no way questioned by the parties to the said above mentioned land contract nor to the parties to said assignment. That a copy of said assignment is hereto appended and made a part hereof marked Exhibit "E," reference to which is hereby prayed.

5. That previous to said assignment the said Moore & Veale Real Estate Corporation had by four separate land contracts (there being one for each of 11 said lots), agreed to sell and convey the same unto one Thomas B. Townsend. That subsequent to this, to-wit, the 29th day of January, 1916, the interest of said Townsend in and to said premises was assigned to Saul H. Meister, one of the contracts and agreed to carry out the agreements and covenants therein contained. Copies of which said contracts are hereto annexed marked Exhibits "C," "D," "E" and "F," and made a part hereof, reference to which is hereby prayed.

6. That contemporaneous with the assignment of the above mentioned land contract from the Moore & Veale Real Estate Corporation to the plaintiff (above referred to as Exhibit "B") the said Moore & Veale Real Estate Corporation sold, assigned and transferred all of the right, title and interest in and to the said land contracts with the said Townsend, afterwards the said Meister, to this plaintiff. Which said assignment was dated December 4th, 1916, and copies of which said assignment will be found on the backs of Exhibits "C," "D," "E" and "F" hereto appended and made a part hereof, reference to which is hereby prayed.

7. That said Saul H. Meister entered into the performance of said land contracts to him transfred by the said Townsend and made payment thereon both to said Moore & Veale Real Estate Corporation and to the plaintiff; but that from and after December 17th, 1917, he made no further payments thereon nor has he since nor any other person in his behalf nor in behalf of anyone else. Further that he failed entirely to pay the Ecorse Village taxes and the state and county taxes for 1917 as by his said contract he had agreed to do.

8. That though often requested thereafter to make up his arrears and to keep up his payments and covenants in said contracts after said December 17th, 1917, he utterly neglected and failed to carry out said covenants so that on July 2nd, 1918, this plaintiff had served upon him a formal notice of forfeiture of said contracts and demand for possession of said premises. That said notice and demand was duly followed by summary proceedings begun by this plaintiff against him before the Honorable Henry G. Nicol, one of the Circuit Court Commissioners of and for Wayne County, Michigan. That said proceedings culminated in

a judgment duly rendered by said commissioner that the plaintiff have judgment of restitution of said premises on July 15th, 1918. All of which a reference to the files and records of said Commissioner's Court, causes No. 482, 145 to 482, 148 inclusive, which is hereby prayed, will more fully appear. That subsequently on August 29th, 1918, Writs of Restitution were duly issued out of said court and were on said date returned duly served. Which said writs were since and to-wit, July 24th, 1919, recorded with the Register of Deeds of Wayne County, Michigan, in Liber 1281, pages 270 to 273 inclusive of such writs, reference to which is hereby prayed.

9. That in said proceedings, said Saul H. Meister, appeared in person and with his attorney, one Simeon Cugell. That said Cugell in behalf of said Meister prevailed upon the attorney for this plaintiff, Daniel R. Foley, to withhold the issuance of said Writs of Restitution for the period of ten days beyond the thirty days allowed by law for such payment after judgment had been entered as above set forth and promised to pay the amount due with costs. That said Daniel R. Foley held open said matter not only for the said extra ten days above referred to but a further period of four days before having said Writs of Restitution issued and served.

10. That subsequent thereto in September and October, 1918, said Saul H. Meister by himself in person and said Simeon Cugell besought Daniel R. Foley to intercede in behalf of said Saul H. Meister with this plaintiff to the end that he might be reinstated in regard to said land contracts and agreed and promised that if this plaintiff would so do he would pay all the arrears in said contract, the village and state taxes which had been paid by said plaintiff, the mortgage tax which said plaintiff had also paid, the cost of said suit and the attorney fee incident thereto. That the plaintiff was at the time willing to enter into negotiations to that end and so instructed said Daniel R. Foley, who in turn communicated the same to said Meister. That said Meister along about November 2nd, 1918, suddenly brought such negotiations to an end by coming to the office of the said Daniel R. Foley and attempting to make a tender of the amount which would then have been due had said contract been in full force and effect at the time. That said Foley had at the time no authority to accept such tender, being only authorized to accept a settlement upon the terms which said Meister had laid down as aforesaid when he asked said Foley to intercede in his behalf. That nothing more was done or said with relation to said contracts either by said Meister or this plaintiff at said time.

11. That said Saul H. Meister along the middle part of July, 1919, procured another attorney, one Thomas Thompson, to approach the said Daniel R. Foley with reference to said lots. Said Thompson who claimed now that he had an interest in said lots by virtue of some arrangement with one Julius Lefton. And that he wished said lots to be granted to him and said old contracts reinstated on payment of the amount at that

time due thereon. Said Thompson exhibiting to said Foley a certain quit-claim deed as the basis of said Meister's claim at the time.

12. That said Foley at once informed his former clients of the affair and began an investigation and from said investigation of the record of Register of Deeds of the County of Wayne found out the following facts:

(a) That on the fourteenth day of June, 1918, there was recorded in said Register's Office a certain quit-claim deed purporting to have been made by said Saul H. Meister as vendor and Julius Lefton as vendee on August 13th, 1917, which embraced all of said lots first above mentioned, said deed being recorded in Liber 1252 deeds, page 494, Wayne County Records, a copy of which is also hereto appended marked Exhibit "G," and made a part of this bill of complaint, reference to which records and exhibits is hereby prayed.

(b) That on the fifteenth day of October, 1918, another quit-claim deed was recorded in said register's office dated October 14th, 1918, which said deed purported to be a subsequent quit claim of said lots by said Meister to said Lefton for the purpose of correcting an error in the first deed above mentioned. Which said deed was recorded in Liber 1308, page 19 of said records, a copy of which is also hereto appended and made a part of this bill, marked Exhibit "H," reference to which is hereby prayed.

13. That said deeds were fraudulent, as the plaintiff believes, and made for the purpose of defrauding and vexing this plaintiff and were wholly without consideration and are and should be declared null and void and of no effect whatever as against any right, title or interest which this plaintiff has in or to said lots. That said Julius Lefton, as this plaintiff is informed and believes, was subject to the draft in the late world war, and was inducted into service some time during 1917 or 1918. That no mention of said quit-claim deed of August 13th, 1917, was ever made to this plaintiff, nor was it in any way aware of its existence until said middle of July, 1919. That this plaintiff never consented either to the transfer of said contracts nor of said Meister's interest in said land, nor was it asked to so consent, although by the expressed terms of said contracts, such consent was required before such transfer could be made. That during the fall of 1917, after said deed was made, said Meister held himself out as a vendee under said contracts and made payments thereon up to December of said year. That he held himself out and acted as the only interested party during all the said Circuit Court Commissioner proceedings, and also throughout all the negotiations subsequent thereto as above stated, and never during all this said period mentioned either to this plaintiff or any one acting in its behalf, that anyone else was in any way interested or had or claimed any right, title or interest in or to said lots. That by various conversations, postals, letters and in every other manner said Meister declared himself to be the owner of the title of said lots as given by virtue of said contracts after said deeds were made, and even in July, 1919, by his attorney, said Thompson, claimed to be the real party in interest, and offered to remove the cloud on the

title thereto caused by said quit-claim deeds provided he were reinstated and recognized as the true and valid and subsisting vendee therein. That no stamps were affixed to either of said deeds as would have been required had they been given for a valuable consideration.

14. That on the same day that said first quit-claim deed was recorded several other like quit-claim deeds from said Meister to said Lefton were made, none of them bearing any revenue stamps, of various properties in regard to which this plaintiff believes said Meister was in like default. And that at other times still other like deeds were made by him and recorded, in all of which this plaintiff believes and has good reason to believe, said Meister attempted to evade his just obligations. And in particular with regard to the two quit-claim deeds herein complained of this plaintiff believes that they were the result of a deliberate and cunning attempt on the part of said Meister to defraud it by perverting the laws in force with regard to men in the United States service, to his own advantage, he being at the time a single man, but at no time in such service for some reason or another.

15. This plaintiff has no definite knowledge as to whether said Lefton participated in said fraud, but that from all the circumstances believes either he knew nothing of said deeds or participated in the same. That it believes and has good reason to believe, that said Lefton never paid any actual consideration for said lots, nor had any actual interest therein, but either suffered his name to be thus used as a vehicle of fraud, or was in ignorance of the transaction. That said land contracts each provided that the interest of the vendee could not be transferred without the written consent of the vendor. That such consent was never given nor asked by or of this plaintiff. That if in fact said Lefton took any active part in said transaction, he had notice of this restriction, and acted at his peril in accepting any conveyance from said Meister. That said Lefton has never by himself nor anyone acting in his behalf, asserted any right, title or interest in or to said lots by virtue of said deeds, but on the contrary, as this plaintiff is informed and believes, said Meister now claims to have whatever interest said Lefton might have had, and is attempting to mulct this plaintiff with such claims. That said Meister has approached others with said old contracts, trying to unload the same upon them to his own profit and at the expense, annoyance and vexation of this plaintiff.

16. That this plaintiff, being at the time in ignorance of said deeds and the cloud on its title thereby, sold said lots to another party on April 24th, 1919, whose interest would also be affected by said deeds and whom plaintiff feels bound to protect.

17. That said deeds constitute a cloud upon the title of this plaintiff to said lots, and being without adequate remedy except in equity, therefore prays:

18. (a) That each of said defendants may be held to answer under oath as to the facts and circumstances stated in this bill and that each

disclose what, if any, right, title or interest he claims at present in or to said lots and in particular that said Lefton discovered to this court what part he actually played in said transaction.

(b) That the said quit-claim deeds above mentioned may be declared fraudulent, null and void of any effect whatsoever as against the title of this plaintiff and that the same be delivered up to be cancelled.

(c) That said defendants, Saul H. Meister and Julius Lefton, be decreed to have no right, title or interest in or to said lots either by virtue of said land contracts or said deeds.

(d) That the cloud placed upon the title of this plaintiff be removed and the decree in this cause may be registered with the Register of Deeds in the County of Wayne and shall stand in effect as cancellation of both of said deeds and as a bar against anyone asserting any right, title or claim in or to said lots.

(e) That each of said defendants be restrained and enjoined from asserting or representing that they or anyone claiming under them have any right, title or interest in or to said lots, and further from placing any further cloud upon this plaintiff's title thereto.

(f) That this plaintiff may have such other and further relief as shall be agreeable to equity.

SECURITY INVESTMENT COMPANY,

(Signed) By Daniel R. Foley,

Its Attorney.

State of Michigan, County of Wayne, ss.

Daniel R. Foley being duly sworn deposes and says, that he is the attorney for the above named plaintiff and makes this affidavit in its behalf, being duly authorized so to do, that he further makes the same for the reason that said plaintiff is not a resident of Wayne County and further that he has a better acquaintance with the facts and circumstances set forth in this bill than any one of the officers of said plaintiff; that he has read the above bill of complaint by him subscribed and knows the contents thereof and that the same is true and to his own knowledge except as to matters therein alleged on information and belief and as to these matters he believes it to be true.

(Signed) Daniel R. Foley.

Subscribed and sworn to before me this 8th day of September, A. D. 1918.

Eugene A. Walling.

Notary Public, Wayne County, Michigan.

My commission expires March 13th, 1920.

Daniel R. Foley,
Attorney for Plaintiff,
1626 Penobscot Bldg.,
Detroit, Mich.

State of Michigan }
County of Wayne, } ss.

(c) Exhibit "2," the Contract Relied Upon.—This contract, made this 19th day of October in the year One thousand nine hundred and fifteen between Moore & Veale Real Estate Corporation, Inc., in Michigan, of the City of Detroit, Wayne County, Michigan, parties of the first part and Thomas B. Townsend party of the second part.

Witnesseth: The parties of the first part, in consideration of the payments to be made and the agreements to be performed by the party of the second part as hereinafter set forth, agree to sell and convey to the said party of the second part, the following described land, situated in the Village of Ecorse, Wayne County, Michigan, to-wit: Lot No. Seventeen (17) of the Moore & Veale's Ecorse Subdivision of the south part of lot two (2) of the Jonas Goodell Estate Sub., P. C. Two Hundred Twenty-Six (226) Village of Ecorse, Wayne County, Michigan.

For the sum of Eight Hundred (\$800.00) Dollars, which the said party of the second part agrees to pay to the said parties of the first part as follows: Eighty (\$80.00) dollars, at the date hereof, and the remaining Seven Hundred Twenty (\$720.00) dollars at the rate of Eight (\$8.00) dollars or more per month. The full purchase price to be paid on or before five years from date, including interest on all sums at any time unpaid hereon at the rate of six per cent. per annum, payable monthly on the 19th day of each and every month in each and every year until said principal sum is fully paid.

It is a condition of this agreement that the party of the second part his heirs and assigns, shall use the premises herein described for residence purposes only except the Jefferson Avenue frontage. Price includes water, sewer, sidewalks and street grading.

Said party of the second part further agrees to enter said premises for taxation in his own name and to pay within days after the same shall become payable all taxes, assessments extraordinary as well as ordinary, that may be levied thereon, including the state and county taxes thereon for the year 1915.

Said party of the second part further agrees that he shall and will keep the building and improvements upon and to be placed upon said premises insured in a responsible insurance company, and to an amount to be approved by the parties of the first part, for the benefit of the parties of the first part until the purchase money is fully paid; and that said party of the second part shall and will keep the buildings and all other improvements upon said premises in good repair.

In case the party of the second part shall fail to pay all taxes and assessments or to insure the premises as hereinbefore provided, the parties of the first part may pay and discharge said taxes and assessments and effect such insurance, and the amounts paid therefore by the parties of the first part shall be deemed a part of the principal sum hereof, and become payable forthwith with interest at the rate of seven per cent. per annum until paid.

It is agreed, by the parties hereto, that the said party of the first part, on receiving payment in full of said principal and interest and of all other sums chargeable in favor hereon, and the performance of all the agreements of the party of the second part herein contained, in the manner and at the time above limited therefor and upon the surrender of this contract shall and will at their own and proper cost and expense furnish a Union Trust Company Abstract of Title and execute and deliver to the said party of the second part, a good and sufficient Warranty Deed of above described premises, free and clear of and from all liens and encumbrances, except such as may have accrued on the said land subsequent to the date hereof, by or through the negligence of the said party of the second part, and which deed shall contain the same building restrictions contained in this contract.

It is further agreed, that the party of the second part shall have possession of said land upon the execution of this contract, and shall be entitled to retain possession thereof so long as there is no default upon his part in carrying out the terms of this contract.

It is further agreed, by the parties hereto, that time shall be of the essence of this contract and that if the said party of the second part shall fail to make any of the payments or perform any of the conditions above set forth, in the manner and at the time above limited therefor, the parties of the first part shall immediately after such failure, have the right to declare this contract void, and to retain whatever may have been paid hereon, and the premises, together with the buildings and improvements thereon and may consider and treat the party of the second part as their tenant holding over without permission, and may take immediate possession of the premises and remove the party of the second part therefrom.

It is further agreed, by the parties hereto, that the said party of the second part shall not assign this contract without the consent of the parties of the first part being first endorsed in writing hereon and on the duplicate copy hereof held by the parties of the first part.

The covenants, conditions and agreements herein contained shall be for the benefit of and binding upon the several parties hereto, and their respective successors, heirs, representatives and assigns.

In witness whereof, the parties hereto have executed this agreement in duplicate the day and year first above written.

(Signed) Moore & Veale Real Est. Corp. (L. S.)

By S. J. Moore. (L. S.)

Thomas B. Townsend. (L. S.)

In Presence of

A. U. Smith.

Carey J. Cole.

State of Michigan, County of Wayne, ss.

On the fourth day of December in the year one thousand nine hundred and sixteen, before me, a Notary Public in and for said county, personally appeared Samuel J. Moore to me personally known, who, being

by me duly sworn, did say that he is the Secretary and Treasurer of the corporation named in and which executed the within instrument and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors and said Samuel J. Moore acknowledged said instrument to be the free act and deed of said corporation.

(Signed) Carey J. Cole.

Notary Public, Wayne County, Mich.

My commission expires Oct. 12, 1920.

Entered on the back of said contract is the following assignment:

Detroit, December 4th, 1916.

In consideration of One Dollar and other good and valuable considerations to it in hand paid by the Security Investment Company, it does hereby sell, assign and transfer unto the Security Investment Company all its right, title and interest in and to the within contract and advantages to be derived therefrom, and said assignee hereby agrees to carry out the terms of the within contract.

Moore & Veale Real Estate Corporation.

(Signed) By S. J. Moore,
Secretary and Treasurer.

(The vendee in the above contract, Thomas B. Townsend, assigned his interest to Saul H. Meister on Jan. 29, 1916, who agreed to carry out the agreements and covenants therein contained.)

(d) Answer and Cross-Bill.—(Caption.) Said defendants answering the bill of complaint in the above entitled cause say:

1. Defendants have no knowledge of the matters stated in paragraphs 1, 2, 3 and 4 of said bill, but are informed and believe that said allegations are true.

2. Defendants admit the allegations of paragraphs 5, 6, 7, 8 and 9 of said bill of complaint.

3. Defendants admit as alleged in paragraph 10 of said bill of complaint that defendant Meister entered into negotiations with Daniel B. Foley, attorney for plaintiff, for the reinstatement of said contracts, and say that said negotiations resulted in an agreement that said contracts were to be reinstated on payment by defendant Meister to said Foley of all the arrears on said contracts, the taxes paid by plaintiff, including mortgage tax, the cost of said suit and a reasonable attorney fee for plaintiff's attorney; that in pursuance of said agreement, defendant Meister tendered to said Foley the sum of \$435 or thereabouts, being the total amount of said arrears, taxes and costs, and offered to pay such further sum of (as might be reasonable) dollars as attorney's fee; that said Foley refused to accept the amount so tendered, demanding an attorney fee of one hundred dollars, which defendant considered unreasonable and refused to pay; that no objection to said tender was made

except as to the amount of attorney fee and that said negotiations were terminated by such disagreement as to the amount of attorney fee and for no other reason.

4. Defendants admit as alleged in paragraph 11 of said bill that defendant Meister, through Attorney Thomas W. Thompson, attempted to reopen negotiations for the reinstatement of said contracts and that said Thompson exhibited a Quit-Claim Deed from defendant Meister to defendant Lefton.

5. Defendants admit the allegations of paragraph 12 of said Bill of Complaint.

6. Defendants deny the allegations of paragraphs 13, 14 and 15 of said bill in so far as it is alleged that said deeds were in any way fraudulent or that said deeds and the interest of said Lefton thereunder were concealed from plaintiff for any fraudulent or wrongful purpose.

Defendants, answering said paragraphs 13, 14 and 15, say that said Quit-Claim Deeds were given by defendant Meister to defendant Lefton as security for an indebtedness justly due from said Meister to Lefton, and that said deeds were given as security for the reason that said Lefton had prior to August 14, 1917, the date said deeds were executed, entered the military service of the United States, and it was desired to protect his interests so far as possible during his absence in such military service; that at the time said Quit-Claim Deeds were executed, said Meister was not in default in his payments under said contracts, but continued his payments for several months thereafter; that said deeds were recorded before notice of forfeiture of said contracts was served on said Meister; that said Meister did not set up the rights of said Lefton under said deeds in the proceedings before the Circuit Court Commissioner or in the negotiations for settlement because he expected to be able to redeem or reinstate his rights under said contracts and thus to reinstate the security of said Lefton created by said deeds. And defendants deny that either of said defendants is attempting or has attempted to defraud or injure any person by means of said contracts.

7. Defendants have no knowledge of the matters set forth in Paragraph 16 of said Bill of Complaint and leave plaintiff to its proofs, but say that if such sale was made, the purchaser, as defendants are informed and believe, would have had notice of the rights of said Lefton under said Quit-Claim Deeds and consequently of the rights of said Meister by reason of the record of said Quit-Claim Deeds, if not otherwise informed of such interests.

8. Defendants deny that plaintiff is entitled to the relief prayed in said Bill of Complaint or any other relief in the premises.

Defendants by way of Cross-Bill say:

1. That defendant Meister has paid under said contracts a large sum of money, to-wit: the sum of one thousand and eighty-eight dollars; that after the judgment rendered by the Circuit Court Commissioner as set forth in said Bill of Complaint, defendant Meister entered into an

agreement with the plaintiff substantially as set forth in the Bill of Complaint and hereinbefore in the answer for the reinstatement of said contracts, by the payment of the amounts in arrears on said contracts, taxes paid by plaintiff, costs of suit and a reasonable attorney fee, and that he tendered to the attorney for the plaintiff the amount so agreed upon, including a reasonable attorney fee, but that the attorney for plaintiff refused to accept said tender claiming an unreasonably large attorney fee.

2. That defendants are willing and have at all times been willing and since the time of said agreement have been able to pay the amount so agreed upon and all payments subsequently accruing upon said contracts, and said defendants hereby agree to pay to plaintiff in consideration of the reinstatement of said contract all sums in arrears upon said contract including all taxes paid by plaintiff, costs of suit before Circuit Court Commissioner and any other costs and expenses including attorney fees which this court may find to be reasonable and proper.

Defendant therefore prays:

1. That the court may take an accounting of the amount due on said contract for principal and interest and taxes paid by plaintiff, and of all other costs and expenses including attorney fees reasonably due to said plaintiff from defendants, and may fix and determine the amount justly due from said defendants to plaintiff.

2. That the court require plaintiff on receiving payment of such sum to reinstate said contracts in full force and effect, to receive the payments thereafter falling due and to convey to defendants or their assigns, upon the completion of said contract, as therein provided.

3. That if any other person is found to have any interest in said property under or through plaintiff, that such person, unless found to have rights superior to those of defendants, be made a party to this suit and decreed to hold such interest subject to the rights of defendants under said contracts.

4. That if the court shall find it to be impossible or inequitable to require the reinstatement of said contract at this time, an accounting be taken of the amount paid by defendants on said contracts and that plaintiff be required to refund to defendants the amount of such payment, after deducting all reasonable costs and charges.

5. That defendants have such other relief in the premises as may be deemed equitable.

(Signed) Saul H. Meister.

Simeon Cugell,

Julius Lefton.

Attorney for Defendants.

By Saul H. Meister.

State of Michigan, County of Wayne, ss.

On this 4th day of February, 1920, before me, a Notary Public, personally appeared Saul H. Meister, one of the defendants named in and who subscribed the foregoing Bill of Complaint, who, being duly sworn,

deposes and says that he has read the foregoing Bill of Complaint by him subscribed and that the facts therein stated are true of his own knowledge except as stated to be on information and belief and that as to those matters he believes it to be true.

Grace Cox,

Notary Public, Wayne County, Mich.

My commission expires October 3, 1921.

(e) Decree.—(Caption.) At a session of the Circuit Court for the County of Wayne in Chancery, held at the courtroom thereof in the City of Detroit, on January 26th, 1921.

Present: Hon. Henry A. Mandell, Circuit Judge.

This cause having come on to be heard on the pleadings on file and proofs taken in open court, and the court having duly considered the same

The court finds:

1. That the quit-claim deeds from Saul H. Meister to Julius Lefton referred to in the Bill of Complaint as Exhibits G and H, and recorded in Liber 1252 of Deeds, page 494, and in Liber 1308 of Deeds, page 19, Wayne County Records, were executed and delivered by defendant Meister to defendant Lefton to secure a certain indebtedness from said Meister to said Lefton; and that on the date of the hearing of this cause, said indebtedness had been fully paid and discharged.

2. That on the 19th day of November, 1920, defendant Saul H. Meister was indebted to the plaintiff under the four contracts referred to in the Bill of Complaint as Exhibits C, D, E and F, and hereinafter more fully described, in the sum of Three Thousand Sixty-Six and 33/100 (\$3,066.33) Dollars, which sum includes the amount due, both principal and interest, on said contracts and taxes paid by the plaintiff with interest which by the terms of said contract were payable by said defendant Meister.

3. That on the date of hearing of this cause, one Charles L. Robertson, and one Samuel J. Moore, and one J. M. Duncan, claimed certain rights or interests in the aforesaid land contracts and the property therein described, by virtue of and under conveyances from the plaintiff made and executed subsequent to July 24th, 1919; and that said parties then and there had knowledge, notice and information of the interest of defendant Meister in and to said contracts and property.

It Is Therefore Ordered, Adjudged And Decreed As Follows:

(a) That the aforesaid quit-claim deeds from defendant Saul H. Meister to defendant Julius Lefton be, and the same are hereby vacated cancelled and set aside.

(b) That defendant Saul H. Meister be, and is hereby relieved from forfeiture of said contracts.

(c) That within thirty (30) days herefrom defendant Meister deposit with the clerk of this court, the aforesaid sum of three thousand sixty-six and 33/100 (\$3,066.33) dollars together with the costs of the proceedings before the circuit court commissioner and one-half of the taxable costs of this court, said costs being in the sum of twenty-seven (\$27.00)

dollars; the said sum in all aggregating the sum of three thousand ninety-three and 33/100 (\$3,093.33) dollars together with interest at 6 per cent from the 19th day of November, 1920, and give notice of such deposit to the plaintiff; that the said plaintiff within forty-five (45) days of receipt of notice of such deposit shall convey the premises herein described by warranty deed and furnish an abstract of title as provided in such land contracts; that said plaintiff shall obtain and deliver to defendant Meister sufficient quit-claim deeds and discharges of any right, title and interest of Charles L. Robertson, Samuel J. Moore, and J. M. Duncan in and to said land contracts and the property therein described; and if said plaintiff cannot procure such quit-claim deeds and discharges, then shall it within such aforesaid period, commence such legal action as may be necessary to divest any such right, title or interest, and prosecute the same with all due diligence until the cloud upon the title by reason of said parties' claims be removed.

(d) Said land contracts are described and identified as follows:

1. Contract dated October 19, 1915, made and executed by and between Moore & Veale Real Estate Corporation, as first parties, and Thomas B. Townsend as second part, and wherein Thomas B. Townsend and Mayo M. Townsend assigned their interest to the defendant Meister on January 29, 1916.

2. Contract dated October 19, 1915, made and executed by and between Moore & Veale Real Estate Corporation, as first party, and Thomas B. Townsend as second party, and wherein Thomas B. Townsend and Mayo M. Townsend assigned their interest to the defendant Meister on January 29, 1916.

3. Contract dated October 19, 1915, made and executed by and between Moore & Veale Real Estate Corporation, as first party, and Thomas B. Townsend as second party, and wherein Thomas B. Townsend and Mayo M. Townsend assigned their interest to the defendant Meister on January 29, 1916.

3. Contract dated October 19, 1915, made and executed by and between Moore & Veale Real Estate Corporation, as first party, and Thomas B. Townsend as second party, and wherein Thomas B. Townsend and Mayo M. Townsend assigned their interest to the defendant Meister.

4. Contract dated October 19, 1915, made and executed by and between Moore & Veale Real Estate Corporation, as first party, and Thomas B. Townsend as second party, and wherein Thomas B. Townsend and Mayo M. Townsend assigned their interest to the defendant Meister.

5. The property in said land contracts is described as follows: Lots 15, 16, 17 and 18, of the Moore & Veale's Subdivision of the south part of lot 2 of the Jonas Goodell Estate, Subdivision Private Claim 226. Village of Ecorse, Wayne County, Mich.

Henry A. Mandell.
Circuit Judge.

A true copy.
Walter Buhl,
Deputy Clerk.

(f) *Authorities Cited by Plaintiff. Brief for Plaintiff.*—The right of plaintiff to bring this suit to quiet title is clearly established in *Donnelly v. Lyons*, 173 Mich. 515. To give plaintiff a decree it was only necessary to recognize, not to enforce, a forfeiture. Equity will recognize a forfeiture when it is simply an incident of a past transaction.

Brown v. Brown, 196 Mich. 684.

Eberts v. Fisher, 44 Mich. 551.

Plaintiff's contention is, that under such contracts as are herein involved, due notice of forfeiture followed by valid summary proceedings, where no appeal or suit in equity is had, and the amount found due is not paid within the 30 days allowed by statute, effectually terminates all right of the vendee in or to the premises, and cuts off all right to a re-instatement or specific performance.

Compiled Laws of 1915, 13240-57.

Public Acts of 1917, No. 243.

Notice of forfeiture in such cases terminates the contract relations of the parties. *LaFrance v. Griffin*, 160 Mich. 240. The defendant must tender the amount due within the time allowed by the statute. *Smith v. Nelson*, 165 Mich. 438. In case of vacant property it has been held that notice of forfeiture alone is sufficient. *Donnelly v. Lyons*, 173 Mich. 515. *Oakman v. Esper*, 206 Mich. 316. Where the notice of forfeiture is insufficient, this defense must be set up in the summary proceedings. *Mills v. Drueke*, 172 Mich. 394. The case of *Lozon v. McKay*, 203 Mich. 366, was cited by the trial court and relied upon, but in that case no summary proceedings were had, and the vendee commenced a suit for specific performance a short time after notice of forfeiture. The amount of the vendee's equity is not material and the summary statute makes no exception, and there is no authority for the statement in *Davis* on Circuit Court Commissioners that where the equity is large, foreclosure should be had in equity, and the amendment of 1917 clearly settles the question, providing for the recording of writs of restitution, adding the significant words that when so recorded "shall be notice to all persons of the termination of the rights of the vendee in and to such lands." Public Acts of 1917, Act 243.

After a forfeiture has been declared on a land contract for the default of the vendee, especially where time is of the essence of the contract, and it is expressly agreed in case of default the vendor shall retain the moneys paid in, the vendee is not entitled either in law or equity to a refund.

39 Cyc., page 2035, and cases cited; 27 R. C. L., paragraph 378, and cases cited; 35 L. R. A. 532 and cases cited; L. R. A., 1918, B. 540 general review of the authorities, 50 Amer. Dec. 680.

Satterlee v. Cronkhite, 114 Mich. 634.

In *Godspeed v. Dean*, 12 Mich. 352, it was held that when the vendor has declared a forfeiture he cannot afterwards recover the purchase price. It follows that if the vendor's right under the contract is cut off, so is the vendee's.

Lawrence v. Miller, 86 N. Y. 131, gives the reason for this rule in such apt language that counsel is constrained to quote the same:

"It is declared in this court in *Havens v. Paterson*, 43 N. Y. 218 (equity case), that it is never permitted in law or equity for one to recover back money paid on an executory contract that he has refused or neglected to perform. The plaintiff in the action before us sues for the whole amount of the money paid by the vendee. The defendant came by it rightfully, in pursuance of a contract lawfully made, by competent parties. He has made no breach of contract. He has failed in no duty to the vendee. Wherefore, then, should he give up that which was rightfully his own? When and whereby did it cease to become his and to be due to the vendee? If the contract had been kept by both parties, the money paid would be his by right. The contract would have been kept, but for a breach by the vendee. To allow a recovery of the money would be to sustain an action by a party on his own breach of contract, which the law does not allow. When we declare that the vendor had done all that the law asked of him we also declare the vendee has not done his part. And when to maintain an action would be to declare that a party may violate his agreement, and make an infraction of it a cause of action. (See *Ketchum v. Everton*, 13 Johns, 359.) Nor can the specious view be taken that defendant is entitled to no more than he was actually damaged. That was substantially the question in *Stevens v. Bland*, 4 Wend. 604, and the answer was against it."

(g) Authorities Cited by Defendants. Brief for Defendants.—The right of a court of equity to grant the relief prayed for in defendants' cross-bill is well settled. *Gregar v. Olde*, 209 Mich. 50. The contention of plaintiff that neither in the above case nor in *Davis* on Circuit Court Commissioner is any authority given for the statement is true, but the reason is given quite clearly in the following paragraph from the *Gregar* case:

"That equity courts have jurisdiction to relieve from forfeitures, direct accounting and grant specific performance where equitable grounds to those ends are properly charged, and satisfactorily proven, is textbook law, and not open to question."

In the case of *Lozon v. McKay*, 203 Mich. 364, the court treated a bill for specific performance as being in effect a bill seeking relief from forfeiture, and granted relief although the vendee had paid only one installment of interest, had paid no taxes for several years, and had never tendered or offered to pay the sums called for by the contract, and although, as the court states: "It is apparently as uncertain now as it has been for years whether the plaintiff can pay what is due to the defendant. It ought to have been tendered before suit was begun, in which case it is likely that no suit would have been necessary."

The power of the court to remit to plaintiff the amount which he paid upon his contract falls under the head of the power to relieve from forfeiture, since, under the equities presented in any particular case, it

might be unconscionable to permit the seller to recover back the property sold, and retain, in addition to it, substantial payments made upon it by the vendee.

This falls under equity jurisdiction, and, as stated in *Gregar v. Olde*, supra, "is textbook law, and not open to question."

Such relief is not without precedent in this state. In the case of *Biddle v. Biddle*, 202 Mich. 160, the court decreed a return to the vendee of the sum of fifteen thousand (\$15,000) dollars which he had paid to the vendor. The contract in question was virtually the same as the one in the case at bar. The court was of the opinion that under all the facts in the case, to permit the vendor to retain the payment would be in effect to enforce a penalty against the vendee.

MOORE v. PROVOST, et al., 205 Mich. 687—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer of Defendants Herman Meier, et al.
- (d) Answer of Defendants T. J. Provost, et al.
- (e) Answer of Defendants W. Miles, et al.
- (f) Answer of Defendants F. E. Tower, et al.
- (g) Decree.
- (h) Authorities Cited by Plaintiff. Brief for Plaintiff.
- (i) Authorities Cited by Defendants. Brief for Defendants.

MOORE v. PROVOST, et al., 205 Mich. 687.

- (a) Brief Statement of Fact.

A bill of complaint was filed to quiet the title to certain land and water rights and rights of flowage. A decree was entered quieting the title of plaintiff and awarding plaintiff the right to maintain certain head of water. The plaintiff appealed and the decree was modified.

- (b) Bill of Complaint.

State of Michigan, in the Circuit Court for the County of Shiawassee, in Chancery.

J. MARTIN MOORE,

Plaintiff,

v.

T. J. PROVOST, HERMAN MEIER, et al.

Defendants.

To the Circuit Court for the County of Shiawassee, in Chancery:

Your orator, J. Martin Moore, of the Village of Byron, in said county and state, respectfully represents unto this Honorable Court:

1. That upon, to-wit, the 21st day of June, 1836, Samuel W. Dexter was the owner of the following described real estate, situated in the Township of Burns and in the Village of Byron, Shiawassee County, Michigan, and more particularly described as follows, to-wit:

(Here property was correctly described.)

2. That about this time a grist mill was located upon said premises and

a portion of said land was used in the regular business of conducting said mill, and the remaining portion thereof was used for the purpose of water power rights; the maintenance of a dam across the Shiawassee River and the consequent flowage of said land for the purpose of operating said grist mill; that said property from the date of the construction of said dam and the erection of said mill has been continuously operated for mill purposes, as aforesaid, down to the present time. That upon the date last mentioned the said Samuel W. Dexter and wife executed their warranty deed of conveyance of said premises unto T. J. Provost, Sydney S. Derby, Calvin Smith and Pierpont L. Smith, said deed of conveyance being recorded upon April 8, 1837, in Liber C of Deeds, upon page 150; that thereafter, and by subsequent conveyance the said T. J. Provost, Sydney S. Derby, Calvin Smith and Pierpont L. Smith, together with their wives, conveyed said premises to Sullivan R. Kelsey, but by an error of the scriviner who drew said deeds of conveyance, leaving a considerable doubt as to whether or not the entire premises above described or only an undivided one-fifth interest therein was conveyed to the said Sullivan R. Kelsey, although such was the apparent understanding of the parties to said conveyance. The last deed of conveyance to the said Sullivan R. Kelsey was made upon, to-wit, the 10th day of December, 1842, and was a warranty deed executed by F. G. Provost and Sydney S. Derby together, with their wives, which was recorded upon the 19th day of December, 1842, in Liber F of Deeds, upon page 360. Various deeds of conveyance including the water power rights and the right of flowage of the lands above described in connection with the operation of said mill carried the title to said premises to Henry H. Rosenkrans and Allen Sheldon, who upon the 16th day of January, 1882, were the owners in undivided equal shares of the above described premises. However, a receiver's deed, bearing date January 15, 1879, executed unto Flavius J. Lake, Sydney Cushing, Franklin B. Daniels and Johnathan E. Herrick, which said deed was void and without effect, casts a cloud upon the title unto said land and the water power rights in connection therewith in the said Allen Sheldon and Henry Rosenkrans, said deed being recorded on the 18th day of February, 1881, recorded in Liber 53 of Deeds, page 197.

3. Thereafter and upon, to-wit, the 16th day of January, 1882, the said Allen Sheldon together with his wife conveyed his undivided one-half interest in the premises above described unto the said Henry H. Rosenkrans, said deed being recorded upon the 28th day of January, 1882, in Liber 38 of Deeds, upon page 283. Thereafter and upon, to-wit, the 14th day of December, 1892, the said Henry H. Rosenkrans, together with his wife, he being then the owner of said premises in fee simple, conveyed the premises above described by his warranty deed of conveyance to William A. and Harriett R. Showerman, said deed being recorded on the 17th day of December, 1892, in Liber 73 of Deeds, page 549. The description in said deed of conveyance includes the premises above described and is as follows:

The Byron Mill Property, so-called. Beginning at a point on the west

side line of Saginaw Street in the Village of Byron, said point lying seventy-five links southerly from the southeast corner of lot No. four, in block No. twenty-two, of said village, and running from said point southerly on said side line of street one chain and twenty-five links to the southern extremity of said line, and to the south line of the village, thence easterly on said south line of the village seventy-five links to the intersection of the village line with the center line of the road, known as the Pontiac and Grand River Road, thence south twenty-one degrees and forty-five links, east on the center line of the Pontiac and Grand River Road, five chains and thirty-three links to the northeast corner of a piece of land deeded by Bowman W. Dennis and Sullivan R. Kelsey to Edward Buckingham, thence south eighty-nine and one-fourth degrees west on the north line of said Buckingham land, six chains and sixty-two links to the right and east bank of the Shiawassee River, thence northerly down stream on the river bank six chains and twenty links to a point seventy-five links southerly from the southwest corner of the above mentioned lot number four, block number twenty-two. Thence easterly and parallel with the south line of said lot three chains and sixty links to the place of beginning, supposed to contain three and sixty-four hundredths acres of land, more or less.

Also the following described land, being the north part of the lot known as the Buckingham lot, beginning on the center line of the Pontiac and Grand River Road at a point five chains and thirty-three links southeasterly from said intersection of said center line with the south line of the Village of Byron and running south twenty-one and three-fourths degrees, east on the center line of said road one chain and twenty-three links, thence south eighty-nine and one-half degrees, west six chains and ninety-six links to the right or east bank of the Shiawassee River, thence north four degrees, west on said right bank of the river one chain and eleven and three-fourths links, thence east eighty-nine and one-fourth degrees, east six chains and sixty-two links to the place of beginning, supposed to contain seventy-nine hundredths of an acre of land. All of the above described land on the northeast fractional part of the northeast fractional quarter of section twenty-three and a part of the north part of the west half of the northwest quarter of section twenty-four of town five north, of range four east, in the County of Shiawassee and State of Michigan.

Also, all of lot B, in I. L. Robert's Addition to the Village of Byron, County of Shiawassee and State of Michigan.

4. Prior to this deed last above mentioned the water power rights, which had been reserved in Sullivan R. Kelsey and Bowman W. Dennis, were released to the grantors in the regular chain of title of the said Henry H. Rosenkrans, and were conveyed in the regular course of conveyance to Allen Sheldon, who upon the 27th day of November, 1900, became the absolute owner of said premises, including all water power rights connected with said mill by a warranty deed of conveyance executed by Edward C. Tuckey and wife to said Allen Sheldon, said deed

being recorded upon the 14th day of December, 1900, in Liber 96 of Deeds, upon page 38. The said Sullivan R. Kelsey and wife and Bowman W. Dennis conveyed the said reserved water power rights to the preceding grantors of the said Allen Sheldon in the regular chain of title by deeds, respectively recorded June 28, 1858, in Volume V of Deeds, upon page 214, and Volume V of Deeds, upon page 217, in the office of the register of deeds, in said County of Shiawassee. The deed executed by the said Sullivan R. Kelsey, which is identical so far as the description is concerned with the deed executed by the said Bowman W. Dennis, contains the following description:

Beginning at the southern extremity of the center line of Saginaw Street in the Village of Byron, thence running south twenty-one and three-fourths degrees, east along the center line of the highway, known as the Pontiac and Grand River Road, five chains and thirty-three links to the northeast corner of a certain lot of land deeded to E. L. Buckingham and Bowman W. Dennis and Sullivan R. Kelsey, thence south eighty-nine and one-fourth degrees west along the north line of said Buckingham's land six chains and sixty-two links to the east bank of the Shiawassee River; thence north two degrees, west along the easterly bank of said river, two chains and fifty-two links to a stake; thence north four and one-half degrees east along the easterly bank of said river, four chains and thirty-nine links to the south line of lot number four on block number twenty-two in the Village of Byron aforesaid; thence north eighty-eight and one-fourth degrees east along the south line of said village lot number four, four chains and thirty-five links to the center line of Saginaw Street, in said Village of Byron; thence south one and three-fourths degrees, east two chains to the place of beginning; also one undivided half of one other piece of land described as follows:

Beginning at a point lying on the center line of the Pontiac and Grand River Road aforesaid, five chains and thirty-five links southeasterly of the southern extremity of the center line of Saginaw Street, in the Village of Byron aforesaid, thence running north eighty-nine and one-half degrees, east six chains and thirty links to a stake standing near the head of the mill race; thence south twenty-seven and one-half degrees, east eleven chains and eighty-five links; thence south fifty-six and one-half degrees, west five chains eighty-eight links to the highway; thence north thirty-two and eighty-eight links to the highway; thence north thirty-two and one-half degrees, west along the highway seven chains and forty and three links; thence twenty-one and three-fourths degrees, west along the center line of the highway eight chains and one link to the place of beginning.

Also one-half of other piece of land described as follows:

Beginning at a point lying on the northeasterly side line of highway one chain and eighty links southerly from the intersection of said northeasterly side line of highway with the south line of the Village of Byron aforesaid; thence running north eighty-eight and one-fourth degrees, east three chains and five links to the northeast corner of a lot of land,

formerly deeded by Dennis and Kelsey to O. Phelps, on the 29th day of March, A. D. 1848; thence north to the south line of a lot deeded by said Dennis and Kelsey to M. W. Kelsey; thence westerly along the south line of said last mentioned lot to the northeasterly line of the highway; thence southerly along the northeasterly line of highway to the place of beginning.

Also one-half of the other piece of land described as follows:

Beginning at a point lying on the northeasterly side line of the Pontiac and Grand River Road, three chains and thirty-three lengths southerly of the intersections of said line of road with the south line of the Village of Byron aforesaid, running thence north eighty-eight degrees and fifteen seconds, east, two chains and ninety-one links to the northeast corner of a certain lot formerly deeded by Dennis and Kelsey to Ziza Goff, on the 29th day of March, A. D. 1848; thence running northeasterly to the southeast corner of the Phelps lot, heretofore mentioned; thence westerly along the south line of said Phelps lot three chains and eleven links to the northeasterly side line of highway; thence southerly along the easterly line of said highway to the place of beginning.

5. Your orator further represents that thereafter the said Allen Sheldon departed this life testate. By the terms of his will recorded upon the 21st day of August, 1905, in miscellaneous records of the register of deeds office, of Shiawassee County, in Liber F, upon page 559, the said Allen Sheldon devised all of the lands above described, in fact, all of his real estate in Michigan, to Henry D. Sheldon. At that time of his death, the said Allen Sheldon was the owner of the premises first above described, together with all water rights in connection with the operation of the mill upon said premises, and by the said devise under the terms of the said will, the said Henry B. Sheldon became the owner of all the said premises and power rights upon, to-wit, the 1st day of May, 1912. The said Henry B. Sheldon, together with his wife conveyed the premises first above described unto your orator by a warranty deed of that date, said deed being recorded upon the 14th day of May, 1912, in the office of the register of deeds of Shiawassee County, in Liber 96 of Deeds, upon page 190, and also upon, to-wit, the 8th day of May, 1912, by his quit-claim deed of that date conveyed unto your orator the water power rights in connection with said premises, said quit-claim deed being recorded upon the 13th day of May, 1912, in the office of the register of deeds, of Shiawassee County, in Liber 132 of Deeds, upon page 616.

6. Your orator further represents that one Samuel W. Dexter, to your orator unknown, claimed at one time certain rights in said premises first above described, by reasons of the sale of said land for taxes for the tax of 1832, said Samuel W. Dexter acquiring whatever rights he had in said premises by reason of a quit-claim deed bearing date June 8, 1840, and recorded upon the 19th day of June, 1840, in Liber E, of Deeds, upon page 117. That said conveyance to the said Samuel W. Dexter was without effect for the reason that said taxes of 1832 were no legal lien upon said premises, and that said tax deed was absolutely void, and further

that the grantees by virtue of said tax deed have lost whatever rights they may have acquired in said premises by the adverse possession of the grantors of your orator in the regular chain of title.

7. Your orator further represents that certain parties who are now owners of land adjacent to the premises first above described are claiming certain rights in and to certain portions of the premises first above described, now belonging to your orator; that the names of said parties are as follows: Herman Meier and Carrie Meier, his wife, Ernest Kelsey and Mary Kelsey, Emma Spangenberg, Frank Alden and Ada Alden, Perry Hadsell, Helen Hadsell, Township of Burns, Shiawassee County, Michigan; Fred S. Ruggles and Effie Ruggles, George Downing and Emma Downing, William Betterly and Cora Betterly, Frank E. Tower and Mamie Tower, John N. Ripley and Vinnie Ripley, Edgar Caulkins and Kiva Caulkins, Robert Coats, Thomas McGee, Elsie McGee, Lucy Kirkendol, Henry Faul, Charles Fritz and Henrietta Fritz, and William Harper and Bertha Harper and Frances Campbell. That these parties and none of them have any right of any description in the premises above described, but their assertion of right and interest in the premises first above described is an open assertion against the title of your orator in said premises and constitutes a cloud upon the right and interest of your orator therein, and should be quieted by a decree of this court.

8. Your orator further represents that attached hereto is a map and diagram of the premises involved, said map, being marked Exhibit A and made a part of this bill of complaint.

9. Your orator further represents for a period of fifty years preceding this date the grantors of your orator have had a right-of-way and easement along the southerly side of land owned by Charles Fritz and Henrietta Fritz and extending around the easterly and northeasterly side of said land to the dam above referred to, used in connection with the operation of said mill; that said right-of-way is 10 feet in width and extends from the easterly side of the Pontiac and Grand River Road, so-called, easterly around said land to the dam aforesaid, a distance of eighteen rods from the center of said road. That this right-of-way and easement was and is a necessary appurtenance to said dam and is the only method of ingress and egress to said dam for keeping same in repair. That said easement and right-of-way as appurtenant to the land described is paragraph one of this bill of complaint has been conveyed to the successive grantors of your orator down to your orator, and that your orator is still the owner of said easement. However, said Charles Fritz and Henrietta Fritz are disputing the right of your orator to use said easement and right-of-way, insisting that your orator has no title in and to said property.

10. Your orator further represents that the mill pond, so-called, which covers a large portion of the land described in paragraph one, and together with the mill race covers all of the second description of land contained in paragraph one of this bill, has very well defined banks and has always been known and used as the mill pond furnishing the water

for the operation of said mill; that various deeds of conveyance in the regular chain of title describes the water power appurtenant to said mill, and the volume of water which may be contained in said mill pond as a sufficient head of water to operate said mill with four run of stone. That the second description of land in paragraph one of this bill is according to a survey of said mill pond around these well defined banks, which have been the boundaries of said mill pond for fifty years and upwards.

11. Your orator further represents that on or about, to-wit, May 15, 1876, as appears by the records in the office of the register of deeds of Shiawassee County, one Charles H. Lemon and wife, executed a mortgage to one Matthias L. Stewart in the sum of \$1,400.00, said mortgage being upon, to-wit, the 26th day of May, 1876, recorded in the office of the register of deeds of Shiawassee County, in volume 5 of mortgages, upon page 487. That said mortgage was a junior mortgage subject to a previously recorded mortgage given by Charles H. Lemon and wife to Allen Sheldon, bearing date May 13, 1876, and recorded in the office of the register of deeds of Shiawassee County upon May 17, 1876, in volume 5 of mortgages, upon page 473. That said last mentioned mortgage was upon the 12th day of December, 1881, foreclosed, and a Circuit Court Commissioner's deed given unto the said Allen Sheldon, which was recorded in the office of the register of deeds of Shiawassee County, upon the 24th day of December, 1881, that thereby the mortgage above referred to running to the said Matthias L. Stewart was cut off and the said Allen Sheldon took a perfect title to the real estate described in paragraph one of this bill, relieved from the lien of said Stewart mortgage. That likewise said mortgage is outlawed and the statute of limitations has run against it for the reason that no payment has been made upon said mortgage in the past fifteen years, and that no recognition of said mortgage has been had or given to it by any person or persons interested, and likewise the said mortgage has been fully paid and satisfied, and should for the foregoing reasons be discharged from record.

Your orator further represents that upon, to-wit, the 28th day of April, 1849, a mortgage was executed by E. L. Buckingham and others, to Hiram W. Hovey, and said mortgage was recorded, upon, to-wit, the 5th day of June, 1849, in Liber B of Mortgages, upon page 343, said mortgage being in the sum of \$300, and covering the portion of land described in paragraph one of this bill. That likewise a certain mortgage was executed by Edward L. Burlingame to Dennis and Kelsey upon, to-wit, the 20th day of January, 1849, and recorded in Liber B of Mortgages, upon page 397, said mortgage being for the sum of \$353.00, and covering a portion of the premises described in paragraph one of this bill. That said mortgages have both been fully paid and satisfied and the statute of limitations has run against them and both should be declared by the decree of this court to be paid and satisfied and discharged.

12. Your orator further represents that T. J. Provost, Sydney S. Derby, Calvin Smith, Flavius J. Lake, Sydney Cushing, Frank B. Daniels, John-

athan E. Herrick, Samuel W. Dexter, Matthias L. Stewart, Hiram W. Hovey, Bowman W. Dennis, Sullivan R. Kelsey, Dennis & Kelsey, Herman Meier and Carrie Meier, his wife, Ernest Kelsey and Mary Kelsey, Emma Spangenberg, William Miles, Frank Alden and Ada Alden, Perry Hadsell, Township of Burns, Shiawassee County, Michigan; Fred S. Ruggles and Effie Ruggles, George Downing and Emma Downing, William Betterly and Cora Betterly, Frank E. Tower and Mamie Tower, John N. Ripley and Vinnie Ripley, Edgar Caulkins and Kiva Caulkins, Robert Coats, Elsie McGee, Lucy Kirkendol, Henry Faul, Charles Fritz and Henrietta Fritz, and William Harper and Bertha Harper and Frances Campbell, persons claiming to be interested in the premises described in paragraph one of this bill of complaint, a portion of whose names appear in the office of the register of deeds in Shiawassee County, Michigan, as having at various times previous to this date claimed certain rights, title or interest or estate in the subject matter of this suit, or in certain portions thereof, and claiming liens or charges thereof without having conveyed or released the same; that said persons under the provisions or legal effect of various instruments of record, claim or might be entitled to claim certain benefits thereunder. Your orator further represents it is not known whether T. J. Provost, Sydney S. Derby, Calvin Smith, Flavius J. Lake, Sydney Cushing, Frank B. Daniels, Johnathan E. Herrick, Samuel W. Dexter, Matthias L. Stewart, Hiram W. Hovey, Bowman W. Dennis, Sullivan R. Kelsey, Dennis & Kelsey, are living or dead, or where they may reside if living or whether their titles, interest, claims, liens or possible rights have been by them assigned to any person or persons, or if dead whether they have personal representatives or heirs living, or where they or any of them may reside, or whether any of their titles, interest, claims, liens or possible rights have been disposed of by will, and therefore such parties are hereby designated by their respective names, and their unknown heirs, devisees, legatees and assigns, as provided for in section 20 of chapter 12 of Act No. 314 of the Public Acts of 1915, of the State of Michigan.

13. Your orator further represents that there are various uncertainties and ambiguities in various conveyances of the premises described in paragraph one of this bill, and various conveyances so executed as to make their validity uncertain, and that there is a class of persons who by reason of said uncertainties, provisions, limitations and restrictions might be entitled in certain contingencies to make claim thereunder. That such class of persons in whose favor such provisions, limitations, restrictions, stipulations, charges, agreements or understandings, might be enforced are unascertained, or not being, and such persons are hereby made parties defendant to this suit, and are designated as all persons claiming under any provision, limitation, restriction, stipulation, charges, agreements or uncertainty in connection with the title to the premises, described in paragraph one of this bill, as authorized by section 21 of chapter 12 of Act No. 314 of the Public Acts of 1915, of the State of Michigan.

14. Your orator further represents that the unknown heirs, devisees, legatees, personal representatives and assigns of the parties referred to in the preceding paragraph are included as defendants herein under section 22 of chapter 12 of said Act No. 314, and more than fifteen years have elapsed since the recording of their title, claims or liens herein complained of. Inasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That T. J. Provost, Sydney S. Derby, Calvin Smith, Pierpont L. Smith, Flavius J. Lake, Sydney Cushing, Frank B. Daniels, Johnathan E. Herrick, Samuel W. Dexter, Matthias L. Stewart, Hiram W. Hovey, Bowman W. Dennis and Sullivan R. Kelsey, Dennis & Kelsey, or their unknown heirs, devisees, legatees, personal representatives and assigns and any class of persons who by reason of any uncertainties, provisions, limitations, restrictions, stipulation, charges, agreements or understanding are claiming thereunder any right, title or interest in connection with their title to the premises described in paragraph one of this bill; and Herman Meier, Carrie Meier, Ernest Kelsey, Mary Kelsey, Emma Spangenberger, William Miles, Frank Alden, Ada Alden, P. Hadsell, Helen Hadsell, Township of Burns, Shiawassee County, Michigan; Fred S. Ruggles, Effie Ruggles, George Downing, Emma Downing, William Betterly, Cora Betterly, Frank E. Tower, Mamie Tower, John N. Ripley, Vinnie Ripley, Edgar Calkins, Kilea Caulkins, Robert Coates, Elsie McGee, Lucy Kirkwood, Henry Faul, Charles Fritz, Henrietta Fritz, William Harper, Bertha Harper, and Frances Campbell, who are made parties defendant hereto, may be required to answer this bill of complaint, but not under oath, their answer under oath being hereby expressly waived.

II. That upon the hearing of this cause this Honorable Court will enter a decree quieting the title of your orator in and to the premises described in paragraph one of this bill, and in and to the right-of-way and easement, as an easement, described in paragraph nine of this bill, and declaring your orator to be the owner in fee simple of all the premises described in paragraph one of this bill, and the owner of the easement and right-of-way described in paragraph nine of this bill.

III. That by said decree of this Honorable Court said clouds referred to in said Bill of Complaint be removed from your orator's title in the premises described in paragraphs one and nine of this Bill of Complaint.

IV. That by the decree of this Honorable Court as against all defendants named in this Bill of Complaint your orator be given the right to flow the lands described in subdivision two of paragraph one of this bill of complaint, for the purpose of obtaining power for the operations of the mill located upon the first description of land in said paragraph one of this bill of complaint.

V. That all defendants named or unnamed herein be by a decree of this Honorable Court enjoined from interfering with your orator's right of possession of the premises described in paragraph one of said bill and from interfering with your orator's right of possession of the premises

described in paragraph one of said bill and from interfering with your orator's right to use the easement and right-of-way described in paragraph nine of this Bill of Complaint.

VI. That your orator may have such other and further relief in the premises as shall be agreeable to equify and good conscience.

J. MARTIN MOORE.

SETH Z. PULVER,

Attorney for Plaintiff,

Business address, Owosso, Mich.

(c) Answer of Defendants Herman Meier, et al.—(Caption.) The answer of defendants, Herman Meier, Carrie Meier, Ernest Kelsey, Mary Kelsey, Emma Spangenberger, Perry Hadsell, Helen Hadsell, John N. Ripley, Minnie Ripley, Edgar Caulkins, Kilea Caulkins, Robert Coats, Elsie McGee, Lucy Kirkendol, Henry Faul, Charles Fritz, Henrietta Fritz and Frances Campbell and Fred L. Ruggles and Effie Ruggles, to the bill of complaint filed herein.

These defendants, answering said bill of complaint, or so much thereof as they are advised that it is material or necessary for them to answer, answering say:

1. These defendants have no knowledge as to whether Samuel W. Dexter was the owner of a piece of land such as described in paragraph one of said Bill of Complaint, but they are informed and believe and charge the truth to be that Samuel W. Dexter never took possession of or occupied the land therein described.

2. These defendants further answering say that they have no knowledge, information or belief concerning the various deeds set forth in said Bill of Complaint further than stated in said bill, and from such statements, they have no information from which they can affirm or deny the existence or correctness of such deeds, and they leave plaintiff to his proof.

3. These defendants further answering deny that the blue print attached to said bill of complaint shows a correct survey or representation of any existing state of facts in and concerning said mill pond.

4. These defendants further answering admit that many years ago, the exact time they cannot state, plaintiff's grantors had a grist mill on the bank of the Shiawassee River on that part of section 24 west of the Grand River Road in the Township of Burns, and as to that portion of the land claimed by plaintiff west of the Grand River Road as now located none of the defendants make any claim, but these defendants deny that the land claimed by plaintiff and attempted to be described by him in his bill of complaint on the east side of said highway is now or ever was owned by plaintiff or used for the purpose of water power rights; and they deny that a dam was maintained continuously across the Shiawassee River and that the land claimed east of the Grand River Road was used for the purpose of operating said grist mill, and they deny that said property east of the said dam and the erection of a mill

has been continuously used or operated for mill purposes down to the present time or down to within twenty years of the date of the filing of the bill of complaint in this cause. On the contrary they show to the court that many years ago, to-wit, more than fifty years ago, the Shiawassee River, so-called, which is supposed to make the mill pond here in dispute, was the north branch of the Shiawassee River, being a natural stream of water varying in depth from one to five feet and in width from twenty to thirty feet, having banks from five to twenty feet high, coming from the lakes over in Argentine, passing just south of the corporate limits of the Village of Byron and joining with the south branch, making the Shiawassee River proper; that at a point about forty rods east of the confluence of the two branches, the north branch of said river passed through high ground termed by some a hog-back or Indian mound. The said river was dammed across on said hog-back or rise of ground and a mill race cut through at the north of said hog's-back to supply water for running a grist mill, at which place also the defendants are informed and believe and charge a bridge was put across and for some time the road called the Grand River Road followed along on the natural rise of ground used as a dam for said mill pond; that, to-wit, for more than twenty-five years last past the highway has been moved and used at a point about thirty rods west of the place where the public used to drive their conveyances on said natural elevation, and that for all of such time, to-wit, for thirty years, or more, no highway or passageway of any kind has existed around or about said dam. On the contrary the original owners used and owned said land and have deeds of the same down to and including all of the land west of the land used as an embankment. And defendants further show to the court that at, to-wit, thirty years ago, a hole was made through the center portion of said hog's-back and a race was made for the purpose of running a saw mill; that such race continued to wear away the silt and embankment and for more than thirty years last past the original channel of the Shiawassee River has been through the center portion of said hog's-back down to the junction with the south branch of the Shiawassee River instead of following its natural channel which was somewhat to the south of the saw mill channel, and the change also has practically emptied the water from the mill pond, and the Shiawassee River is now confined to its banks, except at times of a flood or freshet when there is a head of water in the low and marshy parts of said ancient mill pond, and in the low water and in dry weather said mill pond consists of ponds or mud-holes filled with logs, filth and decaying vegetation to such an extent that it is injurious to the health of all of the inhabitants whose lands adjoin said basin formerly used as a mill pond and which is miasmatic now and threatens the health of the inhabitants of the Village of Byron and the whole community in that vicinity.

5. These defendants further answering show to the court that for many years the mill at Byron had become out of repair and was not operated as a mill; that later, to-wit, twenty years ago, the mill was

burned and the property remained useless for many years, but defendants admit that at the present time the plaintiff has a little feed mill on the site of the mill property west of the highway and said mill gets its power to some extent from the race connected with the Shiawassee River, but the most of the water from the said river goes through the dam where the saw mill race formerly existed and is not upon any property claimed by the plaintiff.

6. These defendants further answering deny that they occupy any land or claim interest in any land except such lands as they and their grantors have had conveyances of and under which they have claimed title and have been in the open, peaceable, continuous, notorious and hostile possession for more than thirty years, and they deny that the plaintiff or his grantors have had or had any right to have any possession or use of their property during the past thirty years.

7. Further answering, the said Elsie McGee avers, and the other defendants herein upon information and belief aver, that she is in possession of all the land between the Grand River Road, the race of the Byron mill property, the pond of the Byron mill property, and the race used for a saw mill, all on section twenty-four in the Township of Burns; that the plaintiff has a right to drive over the same to go to his mill pond but has no other right in and to said property, and plaintiff and his grantors have not been in possession of any part of it, other than herein stated, for more than forty years.

8. Further answering, the said Charles Fritz and Henrietta Fritz say that they are in possession and have the ownership of a strip of land bounded on the north by the land of Elsie McGee, on the east by the Byron mill pond, on the south by the old bed of the north branch of the Shiawassee River and by land of these other defendants, and on the west by the Grand River Road, which does not now and never did belong to said plaintiff or his grantors and in which plaintiff or his grantors have never had any possession or control.

9. Further answering, the said Emma Spangenberg, John M. Ripley, Minnie Ripley, Edgar Caulkins, Kilea Caulkins, Robert Coats, Lucy Kirkendol, Henry Faul and Frances Campbell say that they own land by conveyances from their grantors which is bounded on one side by the Byron mill pond and the Shiawassee River, and they show to the court that they and their grantors have occupied such land for more than thirty years last past under a claim of title; that their occupancy has been continuous, open, peaceable, notorious and hostile; that the plaintiff has not now and never has had any interest in said land and is not entitled to any relief against these defendants. On the contrary they show to the court that the claiming by the plaintiff of some paper title to these premises, if he has such, is a cloud upon their title which they ask to have removed, and they also show to the court that the Byron mill pond, so-called, being nothing but a basin or miasmatic pool, breeding stench and filth and threatening the health of all of these defendants, is a menace to the community and a public nuisance which they

believe in equity they are entitled to have abated and removed, and they ask that under the final order of this court that such nuisance be abated and the health of the community protected therefrom.

10. Further answering, the said Perry Hadsell and Helen Hadsell say that the lands occupied by them are lands which have come to them from and through various conveyances and are lands which they and their grantors have held as owners with open, notorious, peaceable and continuous possession for more than fifty years; that the plaintiff has no right to the possession thereof, and if his deed, or any deeds, pretends to cover said lands, they ask to have such deed cancelled and removed from the title of their property, and they ask to have the miasmatic nuisance known as the Byron mill pond abated and the health of the community protected against a spot which is continually breeding disease and endangering the public health.

11. And the defendant Emma Spangenberg shows to the court that she has a deed of real estate covering the land between the Grand River Road on the south and the Byron mill pond and the north branch of the Shiawassee River on the north; that such land is valuable farming land and that she and her grantors have been in open, notorious, peaceable, continuous and hostile possession of the land that she now occupies for more than forty years last past; that she has paid taxes thereon and improved it and was not aware that by doing so she was encroaching upon anybody's frog pond or miasmatic mud-hole; that plaintiff or his grantors have not had or been in the possession of any of the property which she now occupies, and she shows to the court that the mill pond, so-called, except in time of freshet or high water, is a menace to public health, and she asks that when a final decree is made in this cause that the same be abated as a nuisance kept and maintained by the plaintiff.

12. And the defendants Ernest Kelsey and Mary Kelsey show the court that a part of their farm is on the north side of the Grand River Road and adjoining the north branch of the Shiawassee River; that it was purchased by their relatives and grantors more than forty years ago and for the express purpose of having the river as a place to water their stock; that the banks of the Shiawassee River along their side are from five to twenty feet high; that the river at all times is confined within its banks; and that the plaintiff at no time has had possession of, nor did his grantors ever own any right or interest in their said property; and they aver the truth to be that the plaintiff is not now and never has had any proprietary right in the Shiawassee River as such; that it is a public stream and as such the plaintiff has only a right to use the water coming from said river in common with all of the defendants whose lands adjoin said river and who have had the use thereof for such purposes as they saw fit for the past fifty years, and they show to the court that they and their grantors have also been in open, notorious, peaceable, continuous and hostile possession of all of said land to the center of said river to the north of their property for the last fifty years; and they deny

that the plaintiff has any color of title or right of possession to any part of said land.

13. And the defendants Herman Meier and Carrie Meier also answering said bill of complaint show to the court that they and their relatives and grantors have had a deed of the property which they now occupy adjoining the Shiawassee River and a part of the Byron mill pond, so-called, for the past forty years; that all the land which they now occupy and claim an interest in they have had the open, notorious, peaceable, hostile and continuous possession for the whole of said forty years without let or hindrance from any person; and they show to the court that if the plaintiff claims that he has any paper title to any part of said land that they are entitled to have the same removed as a cloud upon the title of their property; that for the most part where the Shiawassee River passes through their land it has well defined banks and is a public stream of water in which the plaintiff has no proprietary right and has no right to occupy its banks or any part thereof. And these defendants show to the court that during the past twenty years the Byron mill pond, so-called, has been practically a muddy basin, having some low or swampy spots in which decaying vegetation and debris collect and foul the air of the whole neighborhood; that said pond as it now exists is nothing but a miasmatic mud-hole, breeding disease and endangering the health of the whole community; and they ask that in the decree that shall be made in this case that the deed which is a cloud upon their title, if there is one, shall be removed and that the said empty and muddy mill pond shall be declared to be a nuisance and ordered to be drained out and kept free from stagnant water and miasmatic conditions.

14. And the defendants Fred L. Ruggles and Effie Ruggles answering say that the property which they now occupy adjoining said Byron mill pond has been in the open peaceable, continuous, notorious and hostile possession of these defendants and their relatives and grantors from the time that the Village of Byron was platted, and that plaintiff and none of his grantors have had any possession or right to possession of said property during said time, and if plaintiff has any paper title thereto, the same is a cloud upon the title of these defendants, and they ask that the same be removed by this court when the final decree is made in this case; and they also ask that the menace to the health of the entire community in the form of said mill pond be ordered drained and kept free from stagnant water.

15. And these defendants, further answering, deny that the plaintiff has any right to the water in the Shiawassee River different or other than that of these defendants who own land adjoining said river; and they deny that the plaintiff has any right whatever in the real estate belonging severally to these defendants; and they deny each and every material allegation in said bill contained not herein more specifically traversed or denied, and they ask that the rights of each defendant be determined and that they be protected, both in their property and in their

health and person, from the attempted legal encroachment of said plaintiff, and they ask that they have a decree for costs against said plaintiff and such other and further relief in the premises as the proofs in this case shall show that they are entitled to. Carrie Meier, Ernest Kelsey, Mary Kelsey, Emma Spangenberger, Perry Hadsell, Helen Hadsell, John N. Ripley, Minnie Ripley, Edgar Caulkins, Kilea Caulkins, Robert Coats, Elsie McGee, Lucy Kirkendoll, Henry Faul, Charles Fritz, Henrietta Fritz, Frances Campbell, Fred L. Ruggles, Effie Ruggles, Herman Meier.

By A. L. CHANDLER & E. F. WILSON,

Attorneys for said Defendants.

A. L. CHANDLER & E. F. WILSON,

Attorneys for said 20 Defendants.

(d) Answer of T. J. Provost, et al.—(Caption.) The answer of the above named defendants to the bill of complaint of the above named plaintiff.

These defendants saving and reserving unto themselves all manner of exception to the bill of complaint of the above named plaintiff filed in this cause, for answer thereunto, answering say:

These defendants deny each and every allegation contained in the plaintiff's bill of complaint.

ALBERT L. NICHOLS,

Guardian Ad litem of all of the above
named defendants.

(e) Answer of Defendants William Miles, et al.—(Caption.) The answer of the defendants, William Miles, Frank Alden and Adah Alden to the bill of complaint filed in this cause.

The defendants, answering said bill of complaint, or so much as they are advised it is material or necessary for them to answer, answering say:

1. These defendants have no knowledge as to whether Samuel W. Dexter was the owner of a piece of land such as described in paragraph one of said bill of complaint, but they are informed and believe, and charge the truth to be, that since these defendants received their deeds of the property mentioned in such conveyances no person ever took possession of or occupied the land mentioned therein but themselves.

2. These defendants, further answering, say that they have no knowledge, information or belief concerning the various deeds set forth in said bill of complaint further than stated in said bill, and from such statements they have no information from which they can affirm or deny the existence or correctness of such deeds, and they leave plaintiff to his proof; and they aver the truth to be that plaintiff never had more than a flowage right to any of such property and that such right was surrendered and contracted down to the natural banks of the Shiawassee River, and the claim of plaintiff that he has a mill pond formed by said stream is a mere subterfuge to perpetuate a nuisance and mud-hole in the Township of Burns and try to hold the same for speculative purposes to the injury and detriment of all of the lands adjoining said Shiawassee River in that part of the Township of Burns.

3. These defendants, further answering, deny that the blue print attached to said bill of complaint shows a correct survey or representation of any existing state of facts in and concerning said mill pond for the thirty years last passed.

4. These defendants, further answering, admit that many years ago, the exact time they cannot state, plaintiff's grantors had a grist mill on the bank of the Shiawassee River on that part of section 24 west of the Grand River Road in the Township of Burns, as now located, and as to that portion of the land claimed by plaintiff, west of the Grand River Road, none of these defendants make any claim, but these defendants deny that the land claimed by plaintiff and attempted to be described by him in his bill of complaint, on the east side of said highway, is now or ever was owned by plaintiff or used for the purpose of water power; and they deny that a dam was maintained continuously across the Shiawassee River and that the land claimed, east of the Grand River Road, was used for the purpose of operating said grist mill, and they deny that said property, east of the Grand River Road, from the date of the construction of said dam and the erection of a mill race, has been continuously used or operated for mill purposes down to the present time or down to within twenty years of the date of the filing of the bill of complaint in this cause. On the contrary, they show to the court that many years ago, to-wit, more than fifty years ago, the Shiawassee River, so-called, which is supposed to make the mill pond herein disputed, was the north branch of the Shiawassee River, being then and is now a stream of water varying in depth from one to five feet and in width from twenty to thirty feet, having, in places, banks from five to twenty feet high, coming from the lakes over in Argentine, passing just south of the corporate limits of the Village of Byron and joining with the south branch making the Shiawassee River proper. That at a point, to-wit, forty rods east of the confluence of the two branches, the north branch of said river passes through high ground, termed by some a hog-back or Indian mound, composed of sand, and said north branch was dammed across on said hog-back or rise of ground and a mill-race cut through at the north end of said hog's-back to supply water for running a grist mill, at which place also, the defendants are informed and believe, and charge the truth to be, that a bridge was put across and for some time the road called the Grand River Road followed along on the natural rise of ground used as a dam for said mill pond; that, to-wit, for more than twenty-five years last past the highway has been moved and used at a point, to-wit, thirty rods west of the place where the public used to drive their conveyances on said natural elevation, and that for all of such time, to-wit, thirty years or more, no highway or passage-way of any kind has existed around or about said dam. On the contrary, the original owners and their grantees of the land along the Shiawassee River have used and owned the same down to the banks of Shiawassee River under the conveyances which were given to them of land to said river and mill pond; and defendants further show to the court that at, to-wit, thirty years

ago, a hole was made through the center portion of said hog's-back and a race was made for the purpose of running a saw mill; that such race, being through sand, continued to wear away the embankment and for more than thirty years last passed the channel of the Shiawassee River has been through the center portion of said hog-back down to the junction with the south branch of the Shiawassee River instead of following its former channel, and this change in the channel also has practically emptied the water from the Byron mill pond, so-called, and the Shiawassee River is practically confined to its banks except at times of a flood or freshet when the river leaves its banks and overflows in the low and marshy parts of said former pond.

5. These defendants, further answering, show to the court that for many years the mill at Byron had become antiquated and out of repair and was not operated as a mill; that later, to-wit, twenty years ago, the mill was burned and the property remained useless for many years, but defendants admit that at the present time the plaintiff has a little feed mill on the site of the mill property west of the highway, and said mill gets its power, to some extent, from the race connected with the Shiawassee River, but the most of the water from said river goes through the dam where the saw mill formerly existed and is not upon any property claimed by the plaintiff.

6. These defendants, further answering, deny that they occupy any land or claim interest in any land except such lands as they and their grantors have had conveyances of and under which they claim title and have been in the open, peaceable, continuous, notorious and hostile possession for more than thirty years, and they deny that the plaintiff or his grantors have had any right to have any possession or use of their property during the past thirty years; that the plaintiff has not now and never has had any interest in said land and is not entitled to any relief against these defendants. On the contrary, they show to the court that the claiming by the plaintiff of some paper title to these premises, if he has such, is a cloud upon their title which they ask to have removed, and they also show to the court that the Byron mill pond, so-called, being nothing but a dry basin or miasmatic pool, breeding stench and filth and threatening the health of all of these defendants, is a menace to the community and a public nuisance which they believe in equity they are entitled to have abated and removed, and they ask that under the final order of this court that such nuisance be abated and the health of the community be protected therefrom.

7. And these defendants, further answering, deny that the plaintiff has any right to the water in the Shiawassee River different or other than that of these defendants who own land joining said river, and they deny that the plaintiff has any right whatever in the real estate belonging severally to these defendants; and they deny each and every material allegation in said bill of complaint not herein specifically traversed or denied, and they ask that the rights of each defendant be determined

and that they be protected both in their property and in their health and person, and they ask that they have such other and further relief in the premises as the proofs in this case shall show that they are entitled to.

A. L. CHANDLER,
Attorney for Defendants.

(f) Answer of Defendants Frank E. Tower, et al.—(Caption.) The answer of defendants Frank E. Tower, Mamie L. Tower, William Betterly and the Township of Burns.

These defendants, answering said bill of complaint, or so much thereof as they are advised it is material or necessary for them to answer, answering say:

1. These defendants have no knowledge as to whether Samuel W. Dexter was the owner of a piece of land such as described in paragraph one of said bill of complaint, but they are informed and believe, and charge the truth to be, that since these defendants received their deeds of the property mentioned in such conveyances no person ever took possession of or occupied the land mentioned therein but themselves.

2. These defendants, further answering, say that, upon information and belief, they deny all the statements contained in paragraphs two, three, four, five and six of plaintiff's bill of complaint relative to the rights of plaintiff obtained through certain deeds and conveyances in said paragraphs set forth excepting that referring to the ownership of certain lands west of the Pontiac and Grand River Road by the plaintiff, and as to such statement of ownership, they neither admit nor deny the same, not having sufficient information in regard thereto upon which to base a belief, and they, therefore, put plaintiff to his proof thereof.

3. These defendants admit that they are the owners of certain lands and rights adjacent to the premises described in plaintiff's bill of complaint as set forth in paragraph seven thereof; but they deny the statement in said paragraph that these defendants have no right or interest in any of the premises described in said plaintiff's bill of complaint.

4. These defendants deny that the map, diagram or blue print, referred to in the eighth paragraph of plaintiff's said bill and marked Exhibit A, is in any way a correct or accurate map of the premises described in said bill or any of the premises owned by these defendants.

5. These defendants neither admit nor deny the contents of plaintiff's paragraph nine in his said bill, not having sufficient knowledge or information to the facts therein stated upon which to form a belief.

6. These defendants, further answering, say that they have no knowledge, information or belief concerning the other matters and things set forth in said bill of complaint, further than as above stated, upon which to form a belief, and they leave plaintiff to his proof thereof; and they aver the truth to be that the plaintiff never had more than a flowage right upon any portion of the property described in his said bill lying east of the highway, known as the Pontiac and Grand River Road, and

that such right has been surrendered and lost by non-user and contracted down to the natural and original banks of the Shiawassee River as the same existed prior to any of the dates set forth in plaintiff's said bill, and that the claim of plaintiff that he has a mill pond east of the said highway is a mere subterfuge to perpetuate a nuisance and mud-hole in the Township of Burns and try to hold the same for speculative purposes to the injury and detriment of all of the lands adjoining said Shiawassee River in that part of the Township of Burns.

7. And these defendants admit that a long time ago, the exact time of which cannot be stated, plaintiff's grantors had a grist mill on the bank of the Shiawassee River on that portion of section 24 lying west of the Pontiac and Grand River Road, aforesaid, but they aver that a long time ago the said grist mill was destroyed, to-wit, more than twenty years ago, and that none of the land described as lying east of said Grand River has since been used for mill purposes or for flowage or for the purpose of providing power for the operation of a mill referred to in plaintiff's said bill, and that these defendants, and all of them, have, for a period of, to-wit, more than twenty years, been in open, peaceable adverse, notorious, hostile and continuous possession of the lands claimed by them down to the original banks of the Shiawassee River, and that the claim of plaintiff, set forth in said bill, of any rights upon their said premises constitutes a cloud upon their, the said defendants', titles thereto which they are entitled to have removed by the decree of this court; and they deny that the plaintiff has any right to the water in the Shiawassee River different or other than that of these defendants who own land joining said river, and they deny that the plaintiff has any right whatever in the real estate belonging severally to these defendants; and they deny each and every material allegation in said bill of complaint not herein specifically traversed or denied, and they ask that the rights of each defendant be determined and that they be protected both in their property and in their health and person, and they ask that they have such other and further relief in the premises as the proofs in this case shall show that they are entitled to.

(Signed) A. L. CHANDLER,
Attorney for Defendant.

(g) Decree.—(Caption.) At a session of said court held at the City of Corunna in said county, on the 1st day of May, A. D. 1917.

Present, Hon. Selden S. Miner, Circuit Judge.

This cause having come on to be heard upon the pleadings and proofs taken in open court, and after consideration of said pleadings, and hearing of said proofs and the arguments of counsel for the respective parties, it is ordered, adjudged and decreed that the said plaintiff is the owner, in fee simple, and his title is hereby quieted in and to the following described premises situated in the Township of Burns, Shiawassee County, Michigan, and described as follows, to-wit:

Beginning on the west line of Saginaw Street, and 75 links south of the southeast corner of lot No. 4, block 22, Village of Byron; thence

south 1.25 chains; thence east 75 links to center of Saginaw Street; thence south 21 degrees 45 minutes east on center line of Pontiac and Grand River Road 6.56 chains; then south 89 degrees 30 minutes west, 6.96 chains to east bank of Shiawassee River; thence north 4 degrees west, on the right bank of said river, 7.3175 chains to a point 75 links south of the southwest corner of said lot No. 4, block 22; thence easterly parallel south line of said lot No. 4, 3.60 chains to place of beginning, containing 4.43 acres, more or less.

It is further ordered, adjudged and decreed that the plaintiff has a right of flowage and the right to flow the lands hereinafter described, as an appurtenance to his mill property, upon the premises above described, with a nine foot permanent head of water, to be measured by taking the vertical measurement from the bottom of the tail-water to the crest of the water at the head of the mill-race, and the right to increase said head one foot more, to be measured in the same manner, making a ten-foot head, provided the plaintiff and his grantees shall protect and save harmless from all injury all the abutting owners of land adjoining or being west of and below the mill dam of plaintiff as now constructed which may be occasioned by the rise of the additional foot of water in making such ten-foot head.

Said premises which said plaintiff has the right to flow for the purpose of his aforesaid mill with the head of water above set forth, are described as follows:

All the lands and premises of the above-named defendants and any and all of them upon sections thirteen (13) and twenty-four (24) of the Township of Burns, Shiawassee County, Michigan, which will be covered by the water as maintained, with the head of water above described, by the dam the above-named plaintiff now has, situated upon said section 24, in the Township of Burns aforesaid.

It is further ordered, adjudged and decreed that the above-named defendants owning premises abutting upon the mill pond maintained by the above-named plaintiff upon section thirteen (13) and twenty-four (24) of the Township of Burns, Shiawassee County, Michigan, are the owners of the premises covered by the water of said pond above referred to, and of the land under the water, and that their premises extend to the thread of the stream of the Shiawassee River.

It is further ordered, adjudged and decreed that the plaintiff shall have an easement in the nature of a right-of-way over the south ten feet of a piece of land extending from the Pontiac and Grand River Road to the Byron mill pond, so-called, and along said pond at the east side of said dam, being ten feet in width and about eighteen rods long; to be used for erecting, maintaining and repairing said dam and the banks of said mill pond, provided the plaintiff in using the same does as little damage as possible to the freehold; the land being more particularly described as bounded on the south by David Campbell's land, on the east by the Byron mill pond, on the north by the east branch of the

Shiawassee River, or what has been known as the saw-mill race, on the west by the Grand River Road, and situated on section 24 in the aforesaid Village of Byron, Michigan.

It is further ordered, adjudged and decreed that the plaintiff's right of flowage in the premises above described as aforesaid, for that purpose, and easements above referred to, are hereby quieted in the plaintiff for the purposes aforesaid.

All questions in regard to the repair, erection construction or maintenance of the bridge upon the Pontiac and Grand River Road over the mill race, are hereby reserved from the effect of this decree.

This decree shall be without costs to either the plaintiff or the defendants.

SELDEN S. MINER,
Circuit Judge.

(h) Authorities Cited by Plaintiff—

BRIEF FOR PLAINTIFF

Two questions are raised by this appeal:

- (a) The ownership of the land under the pond.
- (b) The construction and maintenance of the bridge over the mill race.

The rules of law relating to riparian rights are established in this state by:

Hartz v. Railway Co., 153 Mich. 33; 4th Ency. of Law (2nd Ed.) 836-837. A description in a conveyance of land describing the land as running to a stake on the bank of a mill pond, conveys the land up to the stake and no further.

Leinbeck v. Nye (Ohio), 24 N. E. 686; Brophy v. Richeson (Ind.) 36 N. E. 424; Eddy v. St. Mars (Vt.) 28 Am. Rep. 695; Carleton v. Cleveland (Me.) 92 Atl. 110. Deeds which described the premises as running "to the edge of the pond," and as being bounded "on the edge of the pond," in the absence of any mention of the pond or of rights in its waters, or any other statement showing a wider intent, passed title only to the low water mark of the pond.

Lynfield v. Peabody, *supra*. By Statute in 1855, the legislature required that mill owners construct and maintain bridges across their races when the race was constructed subsequent to the formation of the highway. Public Acts of 1855, No. 149.

This court has held that this statute merely recognized a duty existing at common law, and that the statute did not impose any new duty but only gave a sufficient remedy for neglect of a duty before existing.

Merrill v. Kalamazoo, 35 Mich. 211. In 1909 a new act was enacted in which the act of 1855 above referred to was incorporated verbatim as amended by Act 65 of the Public Acts of 1875, page 97. In 1915 an act was enacted repealing certain obsolete and inoperative laws, and among the acts so repealed was the above Act of 1855, No. 149. The act of 1909 so far as it relates to the Act of 1855, as amended, must be construed as a combination of the act of 1855, and not as a new enactment.

26 Ency. of Law (2nd Ed.) 733-734. That being the case, the repeal of the original statute, makes the entire law in that respect cease to exist, and if the Act of 1855, as amended, was obsolete and inoperative. the same provisions in the revisions of 1909 are also obsolete and inoperative.

26 Ency. of Law (2nd Ed.) 737. If this statute is obsolete and inoperative, surely the common law must be equally obsolete and inoperative. There is therefore no duty or obligation upon the plaintiff in this case to construct and maintain a bridge across the race in question and that the court was powerless to declare any such duty or obligation. *Railroad Co. v. Read*, 16 Wal. (U. S.) 270; *Camden v. Allen*, 26 N. J. L. 398; *Pratt v. Short*, 79 N. Y. 442.

(i) Authorities Cited by Defendants. Brief for Defendants.—In Michigan the common law prevails and the rule is sustained by an unbroken line of authorities that a grant of land bounded by a stream, whether navigable in fact or not, carried with it the bed of the stream, to the center of the thread thereof. *Lorman v. Benson*, 8 Mich. 18; *Butler v. Railroad Co.*, 85 Mich. 246.

The basic principles of law governing the doctrine of riparian ownership is laid down in, *Hale, De Jure Maris*, Chap. 1; *King v. Warton*, Holt. 499; *Lord v. Sydney Commrs.*, 12 Moore, P. 6.

The rule applies to a mill pond as well as a natural stream, and such words as "to a stake on the bank" does not constitute any limitation. *Hartz v. Ry. Co.*, 155 Mich. 337; *Mansur v. Blake*, 63 Me. 38; *Harrison v. Keene*, 3 Me. 474; *Taylor v. Blake*, 64 N. H. 392; *Van Buren v. Baker*, 12 N. Y. S. R. 209.

In *Luce v. Carley*, 24 Wend. 451 (N. Y.), the boundary ran "to a hemlock stake standing on the east bank of the river," and the court held that where the grant is so framed as to touch the water of the river, and then parties do not expressly except the river, one-half the bed of the stream is included by operation of law.

The reservation must be expressed and not implied. *Butler v. Railroad*, 85 Mich. 246.

The law of 1855 as to maintenance of bridges, was superseded and repealed by the passage of the revision act of 1909, and its technical repeal in 1915, was a mere formality, the act of 1909 is still in force under which we claim relief.

"Where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance." *Shannon v. People*, 5 Mich. 85.

CHAPTER VII

SPECIFIC PERFORMANCE OF LAND CONTRACT RELIEF, WHEN GRANTED—WHEN DENIED GENERAL PRINCIPLES

- § 95. The Remedy Discretionary.
- § 96. Specific Performance General Principles.
- § 97. Application of the Remedy.
- § 98. Same Subject—Continued.
- § 99. Specific Performance of an Agreement to Execute a Land Contract.
- § 100. Predated Agreements Executed on Sunday.
- § 101. Intoxication as Grounds for Refusal Specific Performance of Contracts.
- § 102. Relief Where Wife Fails to Join in Contract.
- § 103. Relief Refused Even if Facts Would Not Warrant Rescission.
- § 104. Specific Performance by Vendor Against Vendee.
- § 105. Inadequacy of Consideration Grounds for Denial of Relief.
- § 106. No Relief if Contract Is Unfair, Harsh, Oppressive or Inequitable.
- § 107. Where Non-Enforceable Agreement Performed by Plaintiff.
- § 108. Specific Performance of Option Contracts.
- § 109. No Relief When Performance Would Be Nugatory or Decree Impossible to Enforce.
- § 110. What Mistakes Warrant Denial of Specific Performance.
- § 111. Effects of First Substantial Breach.
- § 112. Mutuality of the Remedy—Exceptions.
- § 113. Relief Granted—Illustrative Cases.
- § 114. Illustrative Cases—Relief Denied.

§ 95. **The Remedy Discretionary.**—Specific performance of land contracts is not a remedy of right, but rests in the discretion of the court, but such discretion is a judicial one and cannot be exercised arbitrarily or captiously and must be based upon facts proven in the case by competent testimony,¹ and

1. **Remedy Discretionary.** — Although the remedy of specific performance is not a matter of strict legal right, but rests in the sound discretion of the court, held under the evidence that the established principles of equity require spe-

cific performance in this case. *Watkins v. Minor*, 214 Mich. 380.

While the remedy by specific performance is not a remedy of right, and the granting or refusing thereof must rest in discretion, the discretion to be exercised is a

in all cases is controlled by the well established principles of equity. Therefore, where the contract is certain in its terms and for a valuable consideration and is capable of being enforced without hardship to either party, the courts will decree specific performance as a matter of course just as freely and readily as a court of law will award a judgment of damages for breach of contract.²

§ 96. Specific Performance General Principles.—Specific performance is the common equitable remedy for the enforcement of contracts for the sale of real estate. While in other classes of contracts the remedy of specific performance is based upon the inadequacy of the legal remedy and requires a showing

judicial and not an arbitrary one, and increase in value standing alone is not sufficient to defeat the remedy by specific performance of the contract to convey land. *Baller v. Spivack*, 213 Mich. 436.

Kerwin Machine Co. v. Baker, 199 Mich. 122. It is not a matter of course to decree specific performance of contracts, for it requires a sound discretion in view of all the circumstances, and this discretion must not be arbitrary and capricious, but must be regulated upon grounds that will make it judicial. *Friend v. Smith*, 191 Mich. 99.

The jurisdiction of a court of equity to decree the specific performance of contracts is not a matter of right, but is within the sound discretion of the court under the circumstances of each case; and specific performance of a land contract, made by a husband while he held an option on the land, was denied where the wife was not a party to such contract. *Solomon v. Shewitz*, 185 Mich. 620.

Remedy by specific performance is not a remedy of right, but rests in the sound discretion of the court

and plaintiff's case must be clear before that discretion is moved. *Ickler v. Muellen*, 196 Mich. 616.

The granting of relief by decreeing specific performance of a contract is not a remedy of right, but rests, and should rest, in sound judicial discretion. *Nowicki v. Kappelczak*, 195 Mich. 678.

In *McMurtrie v. Benniette*, Har. Ch. (Mich.) 124, it was held that it is not a matter of course to decree specific performance of contracts. It requires a sound discretion, upon a view of all the circumstances; and this discretion must not be arbitrary and capricious but must be regulated upon grounds that will make it judicial. Here the contract appears to be certain and definite, and has been performed by complainants. *Friend v. Smith*, 191 Mich. 105.

For an extended discussion of the discretionary powers of the court in actions for specific performance see *Offcutt v. Offcutt*, 12 L. R. A. U. S. 232, 67 Atl. 138; *Spengler v. Sonnenborg*, 88 Ohio St. 192, 52 L. R. A., N. S. 510.

2. *Pomeroy Eq. Jur. Sec. 2184.*

that the legal remedy is inadequate where land or any estate therein is the subject matter of the agreement, the inadequacy of the legal remedy is well settled and the equitable jurisdiction is firmly established.³

In order to maintain an action for the specific performance of a land contract, such contract must possess the following requisites:

(a) It must be valid and legal and for a lawful consideration. If illegal or against public policy it will not be enforced.⁴

(b) It must be certain in its terms and conditions; one that is vague and uncertain in its terms cannot be enforced.⁵

3. Pomeroy's Equity Jurisprudence, Sec. 1400, 2nd Ed.

4. Where the contract is made on Sunday even though dated some other day, the contract is unenforceable. *Silver v. Shulman*, 213 Mich. 211.

If the agreement is made on Sunday, it cannot be ratified or enforced. *Berston v. Gilbert*, 180 Mich. 638; *Acme Electrical Co. v. Van Derbeck*, 127 Mich. 341 (89 Am. St. 176); *Aspanwell v. Van Derbeck*, 127 Mich. 341; *McClurken v. Decrick*, 33 Ill. 349; *Anderson v. Carkins*, 135 U. S. 4831; *Carley v. Gitchell*, 105 Mich. 38.

5. In order that a court of equity shall exercise its power to decree a specific execution where there has been a part performance, the contract itself must be clear, certain, and unambiguous in its terms, and must either be admitted by the pleadings, or proved with a reasonable degree of certainty to the satisfaction of the court. If, therefore, upon all the evidence given by both parties, the court is left in doubt as to the entire contract or even as to any of its material terms, it will not grant the remedy although a partial performance of

something has been sufficiently proved. *Louisa A. Green v. Josiah W. Begole*, 70 Mich. 602.

"Where the consideration of a contract for the sale of pine land consisted not only of a money payment but of a joint arrangement between the parties for lumbering the land, its specific performance could not be enforced in the absence of any agreement or usage as to the time to be allowed for the lumbering; and the contract is not severable, no portion of it could be specifically enforced.

Courts cannot perfect or enforce contracts from which essential details are omitted." *Samuel G. M. Gates et al. v. Henry Gamble*, 53 Mich. 181.

"Contracts that are so vague in their terms that no one but the parties can say how great an expenditure they contemplate, cannot be specifically enforced by the courts, but must rest on the honor or good faith of the parties."

"A bill for specific performance will not lie and has nothing to lie on, where a son who had orally agreed to support his parents in consideration of his being entitled to a conveyance from them of what-

(c) It must not be within the statute of frauds unless partly performed.⁶

ever estate he might acquire out of the farm profits beyond what they owned at the time, had all such property as he purchased from time to time, and so had under this control, conveyed to his mother, who would not reconvey to him when he asked her to." *Bumpus v. Bumpus*, 53 Mich. 347.

The following quotation from *Shodman v. Handy*, 102, 382, 46 S. E. 380, is a correct statement of the essential elements required of a contract before the courts will specifically enforce it:

"These elements, conditions, and incidents as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, or hard bargain; and its performance not oppressive upon the defendant and finally it must be capable of specific execution through a decree of the court."

Uncertainty of Contract Barring Enforcement.—Where there was no provision in the contract whereby plaintiff agreed to purchase, specific performance was refused for lack of mutuality. *Tattan v. Bryant*, 198 Mich. 515.

Where the agreement does not contain the terms or time of performance not sufficient to entitle plaintiff to specific performance as same does not meet the requirements of the statute of frauds. *Rosenbaum v. Tysyka*, 192 Mich. 457.

Where the agreement does not

contain time of performance, same is too uncertain, specific performance denied. *Nichols v. Burcham*, 177 Mich. 601.

A contract for an exchange of merchandise for other property by the terms of which the undamaged goods are to be inventoried and taken at cost prices, and the damaged goods at "prices agreed upon" is uncertain as to the price to be paid for the damaged goods and cannot be enforced. *Dayton v. Stone*, 111 Mich. 196.

Where the agreement refers to another agreement without specifying the terms of such agreement, it is too uncertain to permit specific performance. *Webster v. Brown*, 57 Mich. 328.

Where the receipt specified the purchase price but failed to specify the times or terms of payment, was held to be insufficient to permit specific performance on the ground that it did not comply with the statute of frauds. *Maynard v. Brown*, 41 Mich. 298.

6. Contract must contain essentials required by statute of frauds, except in those cases where the courts will enforce partly performed verbal contract.

For a full discussion of the relief granted in this class of cases, see Chapter II, Sec. 21, Ante.

If the description is insufficient, the courts will not specifically enforce the contract. *Ebert v. Cullen*, 165 Mich. 75; *Wardell v. Williams*, 62 Mich. 50; *Welch v. Whelpley*, 62 Mich. 16; *Maynard v. Brown*, 41 Mich. 298; *Peckham v. Balch*, 49 Mich. 179

(d) It must be free from all taint of fraud or deceit.⁷

(e) It must, as a general rule, be mutual, both parties equally bound, although there are important exceptions to this rule.⁸

(f) It must be fair and just and free from fraud or surprise and such that it will not be inequitable to enforce.⁹

(g) It must be of such a character that the performance thereof can be compelled by the court. Where from the nature of the case the court will be unable to compel specific performance, it will not attempt to do so.¹⁰

If the contract for the sale of real estate meets the foregoing conditions the courts will specifically enforce it as a matter of course. For case illustrating the rule, see other sections of this work.¹¹ See Sec. 97-113-114 Post.

§ 97. Applications of the Remedy.—Specific performance may be invoked against the vendor by the vendee as well as by the vendee against the vendor.¹² For the mutual exchange of lands, where the deeds were executed and placed in escrow, and all conditions precedent were fulfilled,¹³ although no reason is perceived why, the other essential factors being present, a contract to exchange lands could not be compelled at the instance of either party by specific performance. This remedy

7. If the plaintiff has been guilty of fraud, deceit, or overreaching, specific performance will be denied. *Lake Erie Land Co. v. Chilinski*, 197 Mich. 21; *Rust v. Conrod*, 47 Mich. 449; *Coryell v. Hotchkiss*, 130 Mich. 400.

Of if the contract is oppressive, *Realty Co. v. Shaffer*, 176 Mich. 639.

8. *Hawley v. Sheldeon*, Harr. Ch. 420; *Wardell v. Williams*, 62 Mich. 50; *Maynard v. Brown*, 41 Mich. 298; *Chapman v. Morgan*, 55 Mich. 125; *McDonald v. Bewick*, 51 Mich. 80.

9. *Hicks v. Turck*, 86 Mich. 214; *Monro v. Edward*, 86 Mich. 91; *Rathbone v. Groh*, 137 Mich. 373; *Munch v. Schnable*, 37 Mich. 166;

Chambers v. Livermore, 15 Mich. 381; *Eames v. Eames*, 16 Mich. 348.

10. *Pingle v. Connor*, 66 Mich. 187; *Blancard v. Detroit L. & L. R. Co.*, 31 Mich. 43; *Weed v. Torrey*, 2 Doug. Mich. 344; *Bourget v. Monroe*, 58 Mich. 563; *Buck v. Smith*, 29 Mich. 166; *Green v. Bay City R. Co.*, 158 Mich. 436; *Sanquirisce v. Benedetti*, 1 Bar. 315.

11. See Sec. 97, 113, 114, Post.

12. *Arthur v. Cheboygan*, 156 Mich. 152; *Loveridge v. Shurtz*, 111 Mich. 618; *Hicks v. Turck, et al.*, 72 Mich. 311; *Cole v. Cole Realty Co.*, 169 Mich. 347; 36 Cyc. 686; *Pomeroy Equity Jur.* 2 Ed. 2169.

13. *Bowman v. Gork*, 106 Mich. 163.

may also be invoked in case of lands lying outside of the state so long as the court has jurisdiction of the person of the defendant¹⁴ and could order the proper conveyances, and the same principle holds true in compelling specific performance of lands lying in other counties from where the court is sitting.¹⁵ Where the contract in writing stipulated that the vendee or any person she might designate within a certain period would be entitled to a deed upon payment of the purchase price, the court decreed the assignee of vendee is entitled to specific performance.¹⁶

A vendee in possession under a land contract charges a purchaser from the vendor with notice of his rights under the contract¹⁷ and specific performance cannot be had against the vendor so as to defeat his right.

Where the premises have been conveyed to a bona fide purchaser before the hearing, the court will in some cases enter a decree for damages, in lieu of specific performance.¹⁸ Where defendants owning a fractional interest of the property came into ownership of all after signing the contract for such fractional interest, the court will decree specific performance of only the fractional interest.¹⁹

Frequently in connection with the remedy for specific performance, the plaintiff requests other important relief such as—reformation of an instrument which he seeks to have specifically performed, or seeks relief from forfeiture of a land contract, and to have the contract specifically performed, as a necessary complement to the relief from forfeiture, or in proper cases, all three remedies, might be invoked in the same action.²⁰

14. *Hull v. Turk*, 72 Mich. 31.

15. *Niemelta v. Teakkle*, 210 Mich. 590.

16. *Craig v. Crossman*, 209 Mich. 463.

17. *Slatkin v. Schuman*, 210 Mich. 513.

18. *Morussa v. Timerowski*, 204 Mich. 271.

19. *Wayne v. Beeman*, 211 Mich. 361.

20. See Chap. 12, Post reformation of instruments; *Lozon v. McKay*, 203 Mich. 365, where relief from forfeiture granted and the contract ordered specifically performed. Likewise *John v. McNeal*, 167 Mich. 148; *Staces Chancery Practice Secs. 624 to 628*.

If the abstract is defective the vendee may waive such defect and enforce specific performance.²¹

Where the vendor seeks specific performance against the vendee, he may pray for and obtain a decree for a vendor's lien on the land until such time as the payment of the purchase price.²²

In a note to a subsequent section we have appended a list of the Michigan cases where relief of specific performance has been granted²³ and also a note to another section where relief has been denied.²⁴

§ 98. Applications of the Remedy (continued).—Laches on the part of the plaintiff in bringing his action may be sufficient to defeat the action. But the rule is otherwise where the party seeking relief is a minor or incompetent person.²⁵ Where the delay in taking action does not injure the other party and is warranted by the circumstances it will be no defense.²⁶ If the plaintiff has been guilty of overreaching or has not disclosed facts which the situation of the parties made it incumbent upon him to disclose—specific performance will be denied.²⁷ Where the contract is ambiguous in its terms, the courts will decline to enforce it.²⁸ In the accompanying note we have collected the Michigan cases where the relief of specific performance has been denied.²⁹

§ 99. Specific Performance of an Agreement to Execute a Land Contract.—Where the parties enter into a preliminary agreement to execute a land contract at some subsequent time,

21. *Ogooshevitz v. Wangas*, 203 Mich. 666; *Anderson v. Kennedy*, 51 Mich. 467.

22. *Loveridge v. Schurtz*, 111 Mich. 618.

23. Sec. 113, Post.

24. Sec. 114, Post.

25. *Staces Chancery Practice*, Sec. 626; *Dragoo v. Dragoo*, 50 Mich. 573; *Chandler v. McKinney*, 6 Mich. 322.

26. *Colharin v. Knoch*, 133 Mich. 335.

27. *Wayne v. Beeman*, 211 Mich. 361. Where plaintiff, a shrewd business man did not inform elderly ladies that two of three owners could not transfer the property.

Lake Erie Land Co. v. Chyllnski, 197 Mich. 214. Where a shrewd and irresponsible promoter secured a contract from people of foreign extraction which permitted of great delay in payments.

28. *Slatkin v. Schuman*, 210 Mich. 513.

29. See Sec. 114, Post.

the court may decree specific performance of such preliminary agreement,³⁰ but before the purchaser seeks to invoke this remedy, he should examine carefully his preliminary agreement to ascertain whether or not same contains a sufficient description of the terms of the land contract to fully protect him. For instance, if the agreement is silent as to the date when possession of the real estate is to be given, while it would be possible, if the other terms were sufficient, for the purchaser to enforce specific performance of such preliminary agreement, he, nevertheless, could not obtain possession of the property until he had paid the purchase price in full, as the law presumes that the vendor is entitled to possession until the full purchase price shall have been paid, unless the contract specifies possession shall be given at an earlier date.³¹ Few preliminary agreements, to the considerable disadvantage of the vendor, contain clauses permitting forfeiture for the non-payment of the purchase price, or for failure to pay taxes or special assessments, or contain any mention as to whose duty it will be to keep the premises insured, and in the absence of such provisions in the preliminary agreement, it is very doubtful if the vendor could insist that such clauses be embodied in the land contract itself. All of these considerations should be given due weight by the practitioner before invoking the remedy of specific performance.

§ 100. Pre-Dated Agreements Executed on Sunday.—Occasionally preliminary agreements for the sale of land contracts are executed on Sunday and dated some other day, the parties in such case being under the impression that changing the date cures the infirmity of such agreements having been made on Sunday.

It is well settled that such agreements are absolutely void and cannot be specifically enforced or made the basis of an action for damages. Moreover, such agreements cannot be ratified unless followed by such acts of part performance as would raise strong equities between the parties.³²

30. *Brin v. Michalski*, 188 Mich. 400; *Dreuse v. Wheeler*, 22 Mich. 400; *Ogooshevitz v. Arnold*, 197 Mich. 203. 439; *Gault v. Stormont*, 51 Mich. 636; *Way v. Root*, 174 Mich. 418.

31. *Brin v. Michalski*, 188 Mich. 32. *Silver v. Shulman*, 213 Mich.

§ 101. Intoxication as Grounds for Refusal Specific Performance of Contracts.—It is a fundamental of the law that before there can be a valid contract there must be a meeting of the minds of the parties to such contract, therefore, if the defendant at the time of the execution of the alleged contract sued upon was in such an extreme state of intoxication that he did not comprehend his acts, equity will afford him complete relief not only as to specific performance, but as to rescission as well.³³

Ordinary intoxication in a suit for specific performance has the effect of neutralizing the equities so that the court will not act on either side.³⁴ Intoxication which merely exhilarates and does not materially affect the understanding is not grounds for refusing to specifically perform the contract.³⁵ There are a line of cases holding that intoxication unless induced by the contrivance of the plaintiff is not a defense to specific performance, but these cases and this rule is not in accordance with the weight of authority.³⁶

§ 102. Relief Where Wife Fails to Join in Contract.—Where the wife fails to join in the execution of the land contract with her husband, specific performance cannot be compelled as to her dower interest, and she is not even a proper party defendant.³⁷ In such cases it has been held that specific performance will be granted, against the husband for a conveyance of his interest in the real estate, and deducting from the purchase price compensation for the present value of the wife's contingent right of dower.³⁸ In many of the states a different rule

211; *Aspell v. Hosbein*, 98 Mich. 117; *Acme Electrical Co. v. Van Derbeke*, 127 Mich. 341 (89 Am. St. Rep. 476); *Berston v. Gilbert*, 180 Mich. 638.

33. *Pomeroy Equity Jur.*, Sec. 2210; *Pomeroy Equity Jur.*, Sec. 949.

34. *Cragg v. Holmes*, 18 Ves. 14 note 12; *Pomeroy Eq. Jur.*, 2nd Ed., Sec. 2210.

35. See *Pomeroy Eq. Jur. Supra*:

Corrigan v. Rolph, 265 Ill. 107 N. E. 155.

36. *Elliott on Contracts*, Sec. 2296.

37. *Solomon v. Shewitz*, 185 Mich. 631; *Weed v. Terry*, A Doug. (Mich.), 344 (45 Am. Dec. 257); *Richmond v. Robinson*, 12 Mich. 193; *Buchoz v. Walker*, 19 Mich. 224; *Phillips v. Stauch*, 20 Mich. 369.

38. In *Walker v. Kelly*, 91 Mich.

prevails and equity will not decree specific performance against a vendor, where the wife of such vendor refuses to convey her inchoate dower interest in the land which he has contracted to sell on the ground that compulsion upon the husband would tend to cause him to procure his wife's conveyance of dower against her will.³⁹

§ 103. Relief Refused Even If Facts Would Not Warrant Rescission.—The remedy of specific performance being a remedy of grace and not of strict legal right, is frequently denied, where the evidence for the defendant is not such as would warrant a rescission of the contract. In other words the defendant to defeat the action is not required to show such fraud, mistake, or other facts in defense as would warrant the rescission of the contract. It will be sufficient as a defense if he shows the bargain oppressive, inequitable or unconscionable.⁴⁰

§ 104. Specific Performance by Vendor Against Vendee.—Specific performance will be granted to a vendor of land as freely as in favor of a vendee, though the relief sought is only a recovery of the purchase price. This form of relief is granted to the vendor upon the theory that where an equitable right has been recognized in the vendee, such as specific performance, a corresponding remedial right should be admitted in favor of the vendor.⁴¹

This principle has been recognized in Michigan and the relief of specific performance granted against the vendees where they have taken possession of the real estate even though the land was situated outside of the state,⁴² and in another case where the vendee had made a partial payment on the real estate and had taken possession and made certain changes in the premises, the court granted the vendor specific performance.⁴³

212 (51 N. W. 934), specific performance, subject to the dower rights, was given, where the wife was not a party to the contract; the decree providing for compensation to complainant for present value of such contingent right of dower.

39. Pomeroy Eq. Jur., 2 Ed. 2257.

40. *Rust v. Conrad*, 47 Mich. 449-454 (1 N. W. 265, 41 Am. Rep. 720); *Chicago, Etc., R. Co. v. Lane*, 150 Mich. 162 (113 N. W. 22).

41. *Pomeroy's Equity Jurisprudence*, 2nd Ed. Sec. 2169.

42. *Hicks v. Turck, et al.*, 72 Mich. 311.

43. The contract in this case was:

§ 105. Inadequacy of Consideration Grounds for Denial of Relief.—It is a general principle of equity that mere inadequacy of consideration alone and without other facts and circumstances present will not warrant the court in refusing specific performance; an examination of the cases, however, reveal that this principle is rarely applied, unless the inadequacy is so gross as to shock the conscience of court.⁴⁴ In Michigan the rule is that, mere inadequacy of consideration alone not accompanied by any other elements of bad faith, is not sufficient ground for refusing to specifically enforce a contract,⁴⁵

"Hamburg, Michigan, June 6 (there is a six and seven over it), 1917.

"Received of Ed. Gardner and Della Gardner One Hundred Dollars (\$100) on purchase price of house and lot in Hamburg village. Balance of Eighteen Hundred dollars (\$1,800) to be paid and deed given in five days. A. H. Pearson."

Under this contract the defendants entered into possession. Said the court in its opinion, "It is conceded by counsel for plaintiff that the written evidence of the contract is insufficient under the statute of frauds. The only question involved is whether the defendants by their acts in making partial payment, taking possession, reaping the fruits of the garden and changing the character of the premises have done sufficient to take the case out of the statute and to equitably entitle plaintiff to the decree for specific performance which was awarded by the court below. Partial payment of the purchase price alone is not sufficient to take the case out of the statute. Possession alone is insufficient, but where there is partial payment and possession accompanied by acts of ownership of the vendee changing the character of the freehold, and

lessening its value, a court of equity may award a decree for specific performance." *Cole v. Cole Realty Co.*, 169 Mich. 347.

"It is true that in the case first cited the action was brought by the vendee rather than the vendor, but it is well settled that specific performance is granted in favor of the vendor of land as freely as in favor of the vendee, though the relief actually obtained by him is the recovery of money, the purchase price." The rule is stated in 36 Cyc. P. 686, as follows:

"The vendor or lessor may have specific performance of a contract which has been performed. This is in part because the delivery of possession by him to the vendor involves a change of condition on his part as well as on the part of the vendee, and point to a contract concerning the land; chiefly because, in cases where the remedy is available to the vendee it should, on the ground of mutuality, be available to the vendor likewise." *Arthur v. Cheyboygan*, 156 Mich. 152; *Leveredge v. Shurtz*, 111 Mich. 618.

44. *Pomeroy on Equity*, 2nd Ed., Sec. 2212 and cases cited.

45. *Van Norsdal v. Smith*, 141

unless the inadequacy of the consideration is such as to shock the conscience of the court.

Where the inadequacy of consideration, however, is for a substantial amount, the courts give much weight to this fact and is of itself indicative of improvidence, overreaching or sharp practice and it requires but slight evidence of the presence of these latter factors to move the court to deny the relief.⁴⁶

§ 106. No Relief If Contract Is Unfair, Harsh, Oppressive or Inequitable.—When the plaintiff obtains the contract under such conditions that equity regards the contract unfair and its enforcement a hardship specific performance will be denied,⁴⁷ and it matters not that plaintiff did not intend to take

Mich. 355. Announcing the rule stated in the text and holding that inadequacy of the purchase in connection with other facts were sufficient to warrant the court in refusing specific performance.

Burtch v. Hogge, Hav. 31. Holding that the inadequacy of the consideration may be so palpable as to warrant the court in refusing the relief sought

Rust v. Conrad, 47 Mich. 449. Holding that specific performance will not be decreed if its consideration is inadequate or if it contains overreaching or unfairness. Said the court in this case, "But when a party comes into equity it should be very plain that his claim is an equitable one. If the contract is unequal; if he has bought land at a price which is wholly inadequate, if he has obtained the assent of the other party to unreasonable provisions; if there are any indications of overreaching or unfairness on his part the court will refuse to entertain his case, and turn him over to the usual remedies." *Chambers v. Livermore*, 15

Mich. 381; *Munch v. Shabel*, 37 Mich. 166; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643; *Burton v. LeRoy*, 5 Sawy. 510.

46. *Higgins v. Butler*, 78 Me. 520, 1 Atl. 276. The defendant, a woman, agreed to sell land worth twelve hundred dollars for a horse worth one hundred dollars. The court refused to enforce it. The several elements of inequality, inadequacy of consideration and misapprehension of rights combine to lead the court to its conclusion. *Cathcart v. Robinson*, 5 Pet. U. S. 264, 8 L. Ed. 120; *Gaskins v. Byrd*, 66 Fla. 432, 63 South 824; *Shoop v. Burnside*, 78 Kan. 871, 98 Pac. 202; *Warren Mfg. Co. v. City of Baltimore*, 119 Md. 188, 86 Atl. 502; *Worth v. Watts*, 76 N. J. Eq. 299, 74 Atl. 434; *Bullock v. Eldridge* (R. I.), 90 Atl. 737; *Griffith v. Spratley*, 1 Cox. C. C. 383, 389, 29 Eng. Reprint, 1213.

47. *Pomeroy Eq. Jur.*, 2nd Ed. 2209. Specific performance will be denied where the plaintiff was a clever and financially irresponsible promoter and so frames the contract as to permit of protracted de-

any unfair advantage if the actual result of his bargain is inequality and unfair advantage, equity will not afford him relief.⁴⁸

The inequality which equity regards as material may be divided into two general classes.

(a) Where the defendant acted under the pressing necessity of circumstances, or was at a disadvantage in the transaction by reason of old age, poverty, ignorance, inexperience, sex, etc.⁴⁹

(b) Where the inequality arises not from the condition or situation of the parties, but in the operation of the contract.⁵⁰ Contracts of this class are so indefinite or unqualified as to terms that their enforcement would produce an inequality not foreseen by the defendant.

As an example of first class of contracts, it has been held that even if the price was fair, no undue influence used, or advantage taken the court would not enforce specific performance against an aged, invalid woman who was without male advisers in making the bargain.⁵¹

§ 107. Where Non-Enforceable Agreement Performed by Plaintiff.—In a large number of cases a court of equity will

lays in payment, the sellers are ignorant people of foreign extraction.

48. *Tildersley v. Clarkson*, 30 Beav. 419; *Marks v. Gates*, 154 Fed. 481, 12 Ann. Cas. 120, 14 L. R. A. (N. S.) 317, 83 C. C. A. 321; *Clark v. Rosario Mining & Milling Co.* 176 Fed. 180, 99 C. C. A. 534; *Alabama Cent. R. Co. v. Long*, 158 Ala. 301, 48 South 363; *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072; *Goodwin v. Springer*, 233 Ill. 229, 84 N. E. 234; *Wilson v. Larson*, 138 Iowa, 708, 116 N. W. 703; *George Gunther, Jr., Brewing Co. v. Brywczyński*, 107 Md. 696, 69 Atl. 514; *Banaghan v. Malaney*, 200 Mass. 46, 128 Am. St. Rep. 378, 19

L. R. A. (N. S.) 871, 85 N. E. 839; *Miller v. Laneda*, 75 Or. 349, 146 Pac. 1090; *Latta v. Hax*, 219 Pa. St. 483, 68 Atl. 1016; *Colonna Dry Dock Co. v. Colonna*, 108 Va. 230, 61 S. E. 770.

49. *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214.

Also where there has been overreaching or sharp practices, *Gibbs v. Mintline*, 175 Mich. 626.

No relief will be granted where the contracts are not mutual. *Hollingshead v. Morris*, 172 Mich. 126.

For a case where relief was denied because the contract was oppressive see *Realty Co. v. Shaffer*, 176 Mich. 639.

50. *Pomeroy Eq. Jur.*, Sec. 2209.

51. *Pomeroy Eq. Jur.*, Sec. 2209.

not undertake to specifically perform a contract, because of the nature of the promise, as in the case of contracts for personal service, agreements to procure the assent of third persons, agreements requiring special knowledge, skill, etc., or in cases of incapacity of the parties, or where plaintiff's promise is too indefinable and uncertain, while the contract remains executory in all these cases equity will not afford relief, because of lack of mutuality on the right and obligations growing out of the circumstances of the parties or the nature of the contract, but where such contracts have been executed on the part of the person in whose favor the disability exists then equity will specifically perform the contract.⁵²

Thus, in cases, when a contract for the conveyance of land in consideration for personal services has been entered into as we have seen,⁵³ specific performance cannot ordinarily be invoked to compel the rendering of such personal service, but where such personal services have been fully performed, then specific performance of the contract may be had.⁵⁴

§ 108. Specific Performance of Option Contracts.—Where an option contract is unambiguous in its terms, is free from mistake, fraud or misrepresentation, and is free from unfairness, overreaching or deception, a court of equity will specifically enforce it as a matter of course.⁵⁵

Where a consideration of one dollar was tendered to the vendee of such option contract, such consideration has been held sufficient to support an action of specific performance,

52. Pomeroy Eq. Jur., 2nd. Ed., Sec. 2103, and cases there cited.

53. See Note 60 ante.

54. Where one took possession of land under an oral contract that he should receive title thereto in consideration of supporting the owner during life, and made valuable improvements thereon while carrying out his agreement, he is entitled to specific performance, though title never passed during the owner's lifetime. *Felt v. Felt*, 118 N. W. 953, 155 Mich. 237.

Where an aged woman agreed to convey her property to complainant if he would manage the farm and take care of her and complainant did so for over ten years before her death, he is entitled to specific performance, though title never passed during the owner's lifetime. *Howe v. Benedict*, 142 N. W. 768, 176 Mich.

55. *George v. Schuman*, 202 Mich. 241.

even though the party from whom such option had been taken neglected or refused to receive such sum.⁵⁶

Where a contract for the sale of land follows from acceptance of an option, chancery courts, though recognizing the rule of law as applied to the option consideration, hold that in cases where specific performance is sought, sufficiency of price or adequacy of consideration must be in accordance with the equitable, not the legal rule.⁵⁷

But where an instrument recites a consideration of one dollar, although no consideration was in fact paid or tendered, such an agreement is not sufficient to constitute a binding option.⁵⁸

§ 109. No Relief When Performance Would Be Nugatory or Decree Impossible to Enforce.—A court of equity will not decree specific performance, where either by want of appropriate means and instrumentalities, while pursuing its ordinary modes of administering justice, it will be unable to enforce the decree when made, or performance by the defendant is impossible, or where from the facts and circumstances of the case the decree for any reason would be nugatory.⁵⁹

The cases in which specific performance has been refused upon the grounds above stated, in any way related to land contracts, may be grouped in the following classes:

(a) Contracts Requiring Continuous Service.

The law is now well settled that equity will not affirmatively decree specific performance of a land contract, requiring continuous acts involving skill, judgment or technical knowledge, such as contracts for the erection of buildings in connection with the sale of real estate,⁶⁰ or contracts for the transfer of

56. *George v. Schuman*, *supra*; *Mier v. Hadden*, 148 Mich. 488.

57. *George v. Schuman*, *supra*, distinguishing *Axe v. Tolbert*, 179 Mich. 566.

58. *Axe v. Tolbert*, 179 Mich. 566.

59. *Pomeroy's Equity Juris.*, Sec. 2179, 2178, Vol 5, 2nd Edition.

60. *Green v. Bay City & Port Huron Railroad Company*, 158

Michigan 436. "Specific enforcement of a contract will not be required which provides for unperformed services of the complainants of such a personal and continuing character that supervision by the court is impracticable in securing performance of complainants' undertaking."

Heth v. Smith, 175 Mich. 328. "In equity a parol contract to lease

real estate in exchange for personal services, such as keeping or furnishing a home for the vendor, during his natural life where the action is instituted by the vendor.⁶¹

(b) Incapacity of Parties to Perform.

Where the vendor does not have the title to the real estate equity will not compel specific performance by the vendee of a land contract at the instance of the vendor. If, however, the vendor acquires title either before suit or before the decree has been entered, specific performance will be granted.⁶² In line with this doctrine it has been held that specific performance will be denied where defendant never owned the land nor could he be compelled to buy and convey it to complainant,⁶³ but where the defendants had a contract for the purchase of a

land for the life of the tenant who binds himself in lieu of rent to perform personal services of an indefinite nature, not to be completed in one act, and involving special knowledge, skill, judgment or integrity, or like qualities depending on individual ability requiring the continuous performance of duties, such that a court of equity could not well regulate, is not specifically enforceable.

Pomeroy Equity Jur., Sec. 2183, 2nd Ed. "Even if the contract was sufficiently specific, so that the party, when ordered to operate the railroad would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once, as in the case of the archway, the erection of which was ordered in *Storer v. Great Western Railway*, but in instances innumerable and for an indefinite time. Instead of the final order being the end of litigation, it would be its

fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been a faithful compliance with the order, and the other when exemption from some provision might be claimed, on the ground of inability or unforeseen events." *Port Clinton R. R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544, 556; *Pingle v. Connor*, 66 Mich. 187; *Blanchard v. Detroit L. & L. R. Co.*, 31 Mich. 43; *Weed v. Torrey*, 2 Doug. Mich. 344; *Bourget v. Monroe*, 58 Mich. 563; *Buck v. Smith*, 29 Mich. 166; *Green v. Bay City R. Co.*, 158 Mich. 436; *Sanquircisco v. Benedetti*, 1 Bar. 315.

61. Pomeroy on Equity, Sec. 2193, 2nd Ed.; *Heith v. Smith*, 175 Mich. 328.

62. Pomeroy Eq. Jur., Sec. 2178, 2nd Ed.; *Guild v. Atkinson R. R.*, 57 Kansas 70, 51 Am. 33 L. R. A. 77.

63. *Laubengayer v. Rohde*, 167 Mich. 605.

tract of land specific performance may be enforced where it was within their power to obtain title.⁶⁴ Mere pecuniary inability to perform the contract is not such incapacity as will justify the court in withholding specific performance.⁶⁵

The rule that specific performance will not be decreed against a defendant unable to perform applies even in cases where the defendant's inability to perform results from his own wrongful act as where a vendor after making the contract and before suit conveyed it to an innocent third party, in such cases specific performance will be refused although the defendant may be held for damages.⁶⁶ In case the contract purchaser from the vendor is not an innocent purchaser and he enters into a contract to purchase with full knowledge of a prior outstanding contract, then specific performance may be had against both the original vendor and his vendee.⁶⁷

§ 110. What Mistakes Warrant Denial of Specific Performance.—We are not here concerned with mutual mistakes of fact and of law affordnig the parties the remedies of rescission or reformation as mistakes sufficient to obtain either rescission or cancellation in which all rights in the contract either at law or equity are cancelled, would of course be sufficient to warrant the refusal of the discretionary remedy of specific performance, and that subject is treated elsewhere.⁶⁸ Our discussion here is confined to those circumstances where the mistake is insufficient to warrant rescission or cancellation and

64. *Brin v. Michalski*, 188 Mich. 400.

65. *Pomeroy Equity*, 2nd Ed., Sec. 1405; *Green v. Smith*, 1 Atkinson, 572; *Columbine v. Cluchester*, 2 Phill C. 27; *Hallett v. Middleton*, 1 Rus. 243; *Burk v. Seeley*, 46 Mo. 334; *Burton v. Shotwell*, 13 Bush 271.

66. *Pomeroy's Equity Jur.*, 2nd Ed., Sec. 1405; *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves. 395, 400; *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Smith v. Kelley*, 56 Me. 64; *Little v. Thurston*, 58

Me. 86; *Gupton v. Gupton*, 47 Mo. 37; *Warren v. Richmond*, 53 Ill. 52.

67. *Pomeroy Eq. Jur.* 2nd Ed., Sec. 1405; *Yovell v. Allen*, 18 Mich. 107; *Snowman v. Harford*, 57 Me. 397; *Fullerton v. McCurdy*, 4 Kans. 132; *Houghwout v. Murphy*, 22 N. J. Ed. 531; 21 N. J. Eq. 118; *Cole v. Cole*, 41 Md. 301; *Bryant v. Booze*, 55 Ga. 438; *Johnson v. Bowden*, 37 Tex. 621; *Bird v. Hall*, 30 Mich. 347; *Gregg v. Hamilton*, 12 Kan. 333.

68. See Chapter XII on Reformation of Instruments.

yet which may be a sufficient reason for a court of equity in the exercise of its discretion to deny specific performance.

(a) Mistake Induced by Plaintiff.

It is well settled that where the mistake was induced or caused by the conduct of the plaintiff equity will not decree specific performance against the defendant if the mistake was a material one. It makes no difference even if the intentions of the plaintiff were honest, he must bear the burden of loss which he has assisted in producing.⁶⁹

(b) Mistake Known to Plaintiff, But Not Induced by Him.

In many cases equity will refuse specific performance where the plaintiff knew a mistake was being made by the defendant or the circumstances were such that he might be charged with notice of the facts,⁷⁰ and even where the mistake is of such a character that ordinarily it would not avail the defendant as a defense, yet if the plaintiff knew of it at the time it was made equity will refuse to specifically perform the contract.⁷¹ From what has been said it is obvious that if the mistake has been brought about by the defendant's negligence the courts will as a rule refuse to accept the mistake as a defense.⁷²

(c) Mistake by Defendant Without Negligence.

Where the mistake is due solely to the defendant, but without negligence on his part and without overreaching or advantage taken by the plaintiff, the rule is that equity will afford relief and refuse specific performance only where the mistake relates to a vital portion of the contract, and this means, that it is not a mistake in mere difference in quantity, but a mistake

69. Pomeroy Equity Jur., 2nd Ed. 2202; Denny v. Hancock, L. R. 6 Ch. App. 1; Mason v. Armitage, 13 Ves. 25; Goddard v. Jeffreys, 51 L. J. Ch. 57; Bascombe v. Beckwith, L. R. 8 Eq. 100; Western R. R. Co. v. Babcock, 6 Met. 346; Van Praeger v. Everidge (1902) 2 Ch. App. 271, 2 Pomeroy Eq. Jur., 4th Ed. 860; Smith v. Toth, 61 Ind. App. 42, 111 N. E. 442; Louisville Ry. Co. v. Kellner-Dehler Realty Co., 148 Ky. 765, 147 S. W. 424; Allen v. Kirk, 219 Pa. 574, 69 Alt. 50.

70. Pomeroy Eq. Jur. 2nd Ed. 2203.

71. Pomeroy Eq. Jur. 2nd Ed. Sec. 2203.

72. Pomeroy Eq. Jur. 2nd Ed. 2203; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Twining v. Neil, 38 N. J. Eq. 470; Boorum v. Tucker, 51 N. J. Eq. 135, 141, 26 Atl. 456; Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300; Webster v. Cecil, 30 Beav. 62.

that goes to the whole contract.⁷³ The rule has been stated by one court in the following language.⁷⁴ "If he (the defendant), was not misled by any act of the vendor then the court ought not to let him off his bargain on the ground of a mistake made solely by himself, unless the case is one of considerable harshness and hardship."

§ 111. Effects of First Substantial Breach.—With land contracts, as with all other classes of contracts, it is a well settled principle of law that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform. It follows, therefore, that before the vendor can maintain any action against the vendee in reliance upon the terms and conditions of the contract, he himself must not have been guilty of any breaches of the contract. In like manner it follows that the vendee cannot maintain any action against the vendor, either for specific performance or otherwise, if the vendee has committed any substantial breaches of the contract.⁷⁵

§ 112. Mutuality of the Remedy—Exceptions.—A contract to be specifically enforced by the courts must as a general rule, be mutual. That is to say, it must be such a contract that each can enforce the same against the other. If by reason of the nature of the contract, the incapacity of the parties or for any other cause, the contract is incapable of being enforced against one party, that party is incapable of enforcing the same against the other. This doctrine has obtained a firm place in equity and has been followed by a number of Michigan decisions.⁷⁶

As stated in a late Michigan case the exceptions to the doc

73. Pomeroy Eq. Jur., 2nd Ed. Sec. 2205.

74. Goddard v. Jeffreys, 51 L. J. Ch. 57.

75. Jones v. Berkey, 181 Mich 472.

76. Blanchard v. Railroad Co., 31 Mich. 43; Buck v. Smith, 29 Mich. 166.

Holding remedies were not mutual. Heth v. Smith, 175 Mich. 328.

A contract to convey which is not mutual and has not been accepted will not be specifically performed. Hollingshead v. Morris, 172 Mich. 126; Green v. Railroad, 158 Mich. 436; Pomeroy's Eq. Jur., Sec. 2191.

trine have been so numerous and varied that at the present time the rule has little force.⁷⁷

It should be noted that the test of mutuality is the rights and obligations at the time of filing the bill and not at the date of making the contract.

We shall now consider some of the apparent exceptions to the rule which applies to land contracts.

Where A Contract Is Signed By Only One Party.

The statute of frauds requires the vendor only to sign the agreement to sell. It is therefore very clear that until acceptance by the vendee there is no mutuality of remedy, but when the vendee files a bill of complaint to require specific performance from the vendor he thereby submits to the jurisdiction of equity and the remedy thereby becomes mutual.⁷⁸

Option Contracts.

The common form of unilateral contract known as the option is not an actual exception to the doctrine of mutuality for the reason that an option is nothing more than a binding offer. There is nothing to enforce against the optionee until the option has been exercised and usually this is done by payment of the purchase price.⁷⁹

§ 113. Relief Granted, Illustrative Cases.—The following are illustrative cases where the relief of specific performance has been granted by the Michigan Courts:

On a bill by the vendee for the specific performance of a land contract where the evidence was in dispute as to the amount due on the contract the Supreme Court reversed the decision of the lower court refusing such relief and entered a decree for the plaintiff.⁸⁰

77. *Reo Motor Car Co. v. Young*, 209 Mich. 591.

78. *Pomeroy's Eq. Jur.*, Sec. 2192.

79. *Pomeroy's Eq. Jur.*, Sec. 2194.

80. "On a bill by the vendees for specific performance of a land contract for the sale of a house and lot, where the evidence is undisputed that a \$1,000 payment, credited on the contract at the date of

the making, was never paid, and, as claimed by plaintiffs, was never intended to be paid, which defendant claims was credited with the understanding that plaintiff's father would pay it inside of two weeks; evidence as to the conflicting claims examined, and held, preponderate in favor of plaintiffs and to require reversal of the de-

The fact that real estate has increased in value since the execution of the contract is insufficient to defeat the right of the vendee to specific performance on a contract of sale.⁸¹

Where a firm of attorneys enter into a contract whereby it was stipulated as a payment for their services they should receive one-third of the land recovered, a decree for specific performance was held to be not legally objectionable because the specific land in which such interest should attach, was not described.⁸²

Where the vendee appeared at the appointed time and place ready and willing to pay and the vendor failed to appear, sufficient tender was made to entitle the vendee to specific performance of the land contract. It was not necessary to prepare and tender a deed to be executed by the vendor.⁸³ In order to invoke the relief of specific performance a parol contract for conveyance of real estate should be clearly established in its

cree for defendant in the court below." *Barker v. Finley*, 200 Mich. 166.

81. "While the remedy by specific performance is not one of right, and rests in the discretion of the court, such discretion to be exercised is a judicial one and cannot be arbitrarily or captiously exercised, and must be based upon facts proved by competent testimony."

"Specific performance of a contract to convey a factory site will not issue upon condition that plaintiff erect a factory on such site, where no such condition was inserted in the contract of sale, and if plaintiff was required to meet such condition it would probably be unable to induce a railroad company to make side-track connections, and would have to make them itself at considerable expense." *Kerwin Machine Co. v. Baker*, 199 Mich. 122.

82. "In a suit for specific performance of a contract between a firm of attorneys consisting of one of plaintiffs and the decedent of the other and defendant whereby the firm was employed by defendant as her attorney to prosecute a contemplated suit to recover certain lands and the firm was to have as compensation a one-third interest in recovered lands, a decree for specific performance was not legally objectionable because the specific lands to which such interest should attach were not described in the contract or because the lands were to be divided when recovered, as after recovery the contract would relate to the recovered lands, specifically and it would be as though the specific items recovered had been originally written in the contract." *Gates v. McLaughlin*, 199 Mich. 438.

83. *Frazer v. Hovey*, 161 Mich. 819.

essentials by a convincing preponderance of the evidence to warrant a decree to justify such relief.⁸⁴

Where a party secured an option on an agreement on a piece of property for \$1,000.00 per acre and within a few months thereafter sold it for \$2,000.00 per acre, the fact that the property had increased in value was not sufficient to warrant the court in refusing to specifically perform the contract.⁸⁵

If the abstract of title is defective by disclosing certain building restrictions, the vendee cannot be compelled to accept such title, and he will be justified in declining to go forward with the sale, and cannot be compelled to do so by specific performance.⁸⁶

While the courts are reluctant to attempt to enforce specific performance of contract requiring personal service extending over a considerable period of time, nevertheless such relief has been granted by the Michigan Supreme Court, in a case where a father deeded certain premises to his son who was to conduct a saloon business thereon, pay existing encumbrances against the same and then execute a life lease to the father who was to have "a living out of the proceeds of such business without charge," therefore, upon performance of this contract by the

84. *Prendergast v. Prendergast*, 206 Mich. 526. "On a bill for the specific performance of a contract to convey land by a father to a son in consideration of the son's living at home, working the land, and making a home for the father, executed upon the part of plaintiff, evidence held sufficient to establish an agreement to convey to plaintiff the homestead of 40 acres."

85. "The finding of the court below that the option price of \$1,000 per acre was, at the time the option was given, a fair market price and all that could have been obtained in the open market, held, supported by the evidence.

The contract being complete in its terms, and not being shown to

have been procured by any misrepresentation or fraud, and plaintiff having fully performed or made tender of full performance which was kept good by tender into court of the full contract price, the decree of the court below in favor of plaintiff for specific performance will be affirmed." *George v. Schuman*, 202 Mich. 242.

86. *Hicks v. Tierck*, 72 Mich. 311. "It does not appear to be denied that the abstract showed that the premises were subject to certain building restrictions. It is undoubtedly true, as plaintiff urges, that building restrictions constitute a cloud upon the title." 39 Cyc. P. 1500 and cases cited.

son it was held that the father was entitled to specific performance of the agreement for his support.⁸⁷

Where a defendant had entered into a written contract which was certain in its terms free from ambiguity and was fair to all the parties specific performance will be decreed even though a consideration of one dollar was tendered in satisfaction of the consideration stated in the instrument.⁸⁸

It has been held that where a daughter entered into a contract with her father to purchase from him a house and that she was to be permitted to occupy it by paying five per cent. interest on the agreed purchase price and had taken possession of the premises and held the same for six years, keeping up the repairs and paying the taxes, that specific performance would be decreed against the father.⁸⁹

It has also been held that where defendants entered into an oral contract for the sale of a house and lot and plaintiff took possession under such verbal contract, exercised acts of ownership over the property, including remodeling a portion of the house, specific performance would be granted at the instance of the vendor against the vendee.⁹⁰

If the abstract of title to the premises is defective the vendee may waive such defect and enforce specific performance against the vendor.⁹¹

87. *Whitman v. Whitman*, 207 Mich. 337.

88. *George v. Shuman*, 202 Mich. 242.

89. *Fowler v. Isabel*, 202 Mich. 572.

90. *Pearson v. Gardner*, 202 Mich. 360.

91. "When this situation developed it was the duty of defendants to do one of two things, either get the building restrictions released or return plaintiff's payment to him. Plaintiff suggested they return his money but defendants refused to do so and denied that he was entitled to it, thereby claiming, by implication at least, that

he was still bound to perform. While matters stood in this wise and before defendants had acquiesced in plaintiff's election he advised them in writing he would waive the defects and would deem himself bound by the contract. This then placed the parties back in the position where both were bound to perform the contract. But counsel says that plaintiff repudiated the contract on January 25th and he could not thereafter insist on defendants performing it. True, he elected to have a return of his money as he had a right, as the abstract did not show a clear title, but by reason of defendant's insistence that he was bound by his

Where pursuant to an agreement for the exchange of land and deeds have been executed and deposited in escrow, equity will enforce a specific performance of the contract and the suit of the party who has complied with the conditions upon which the deeds were deposited.⁹²

The purchaser of a lot in a tract which the vendors represented to be subject to building restrictions may enforce equitable obligations to sell the remainder of the property in that tract subject to such building restrictions.⁹³ It has even been held that a parol agreement by parents made with their son to land adjoining their own in consideration of his making his home thereon and working and improving the same may if the son fulfills the conditions be specifically enforced by his wife and children after his decease.⁹⁴

Specific performance may be invoked by a husband against his wife to compel her to carry out the terms of a settlement of their mutual property upon separation.⁹⁵ A contract by which a wife conveys her dower to her husband in consideration of the conveyance by him to her of property held is a proper subject for specific performance at the interest of the husband.⁹⁶

Specific performance of an oral agreement to convey defendant's farm to plaintiff in consideration of services rendered for which plaintiff received no compensation has been granted.⁹⁷ An oral contract by a mother fully performed on one side to

contract, he waived the defects and advised them that he would accept a conveyance subject to the defects.

"It is also argued that plaintiff did not perform within 30 days and that time was of the essence of the contract and, therefore, he is not entitled to specific performance. The contract provided that he was to forfeit the payment only in the event that he failed 'to complete the agreement on his part within 30 days.' The plaintiff was not in default. The defendants were in fault. This being true, plaintiff had a right to, and did,

waive the defects, and after so doing he had a right to insist upon a performance by defendants." *Anderson v. Kennedy*, 51 Mich. 467; 36 Cyc. P. 746; *Ogooshevitz v. Warijas*, 203 Mich. 666.

92. *Bowman v. Gork*, 106 Mich. 163.

93. *Statt v. Avery*, 156 Mich. 674.

94. *Briggs v. Briggs*, 113 Mich. 371.

95. *Segler v. Segler*, 108 Mich. 591.

96. *Dakin v. Dakin*, 97 Mich. 284.

97. *Woodward v. Walker*, 192 Mich. 188.

convey to her daughter and her husband a homestead in consideration that the latter would render such services as had been rendered would be specifically enforced.⁹⁸ See also additional cases in the note.⁹⁹

§ 114. **Illustrative Cases, Relief Denied.**—Where the plaintiff has not fully performed the contract on his part, and the nature thereof is such that the court cannot compel performance by the plaintiff, it will refuse to decree specific performance by the defendant.¹⁰⁰ The vendee in a land contract in asking a decree for a deed must show that he has paid the purchase price or that he is ready, able, and willing to pay such purchase price, otherwise a decree for specific performance will be refused.¹⁰¹

98. "A contract fully performed on the one side, to convey to a daughter and her husband defendant's homestead in consideration that the former would give up their farm, move to the home in the village and occupy it with defendant, and make some improvements named, the deed to be executed when the improvements were completed, is enforceable against the grantor though it was not in writing.

"It is not a matter of course to decree specific performance; a sound discretion is exercised, and the same must not be arbitrary and capricious, but regulated on judicial grounds; where the terms are certain and definite, the acts of the parties and performance on the one side take it out of the statute." *Friend v. Smith*, 191 Mich. 99.

99. *Rubenstine v. Powers*, 215 Mich. 435. Where specific performance was enforced against both vendor and vendee and where vendor was compelled to specifically perform as to a fractional interest.

Friskorn v. Fitzgerald, 215 Mich.

106. Where property had greatly increased in value by plaintiff's own efforts.

Birney v. Ready, 216 Mich. 7. Where specific performance was granted to a vendee on cross-bill who had purchased.

Goodman v. Wobig, 216 Mich. 51. Relating to the assignment of a patent.

Standard Oil Co. v. Murray, 214 Mich. 431. Relief of specific performance in this case was granted and it was held that it was no defense to the action of specific performance where the defendant claims she did not understand the contract and there was no showing of fraud or misrepresentation on the part of plaintiff or his agent.

It was also held in this case that conversations between the defendant and her attorney tending to show what instructions she had given him, were not admissible in evidence.

100. *Green Bay City v. Port Huron R. Co.*, 156 Mich. 436.

101. *Morris v. Hoyt*, 11 Mich. 8.

On the other hand the vendor must show that he is ready, willing, and able to give a good title to the lands which he contracted to sell before he can maintain a bill for specific performance against the vendee, as the court will not compel a vendee to accept a doubtful title, and the vendee is entitled to a reasonable time and opportunity to examine the title.¹⁰² Unless the contract is mutual and binding on both parties, the court will not enforce it.¹⁰³

Where a contract has been obtained by sharp or unscrupulous practices, specific performance will not be enforced.¹⁰⁴

Illustrating the principle that the court will not enforce inequitable contracts, it has been held where a contract to exchange property would result in the plaintiff being compelled to transfer his property for practically nothing, the court in such case, would not decree specific performance.¹⁰⁵

Where it would be inequitable to do so, the court will not grant the relief of specific performance.¹⁰⁶ Where the moving party in an action for specific performance comes into court, having driven an inequitable bargain, the court will refuse to specifically perform the contract.¹⁰⁷

102. *Ford v. Wright*, 114 Mich. 189; *Gray v. Mill*, 105 Mich. 189; *Walker v. Sullivan*, 127 Mich. 267; *Raynard v. Davis*, 127 Mich. 571; *Lambert v. Weber*, 83 Mich. 395.

103. Where payment has been made by the purchaser and there is no delivery of a written acceptance of the vendor's offer, although such acceptance has been signed by the purchaser, a contract to convey the land was not mutual, and not enforceable against the vendor. *Hollingshead v. Morris*, 172 Mich. 126.

104. Specific performance of a contract for the sale of land will not be awarded if it has been obtained by sharp or unscrupulous practices or by overreaching or concealment of important facts. *Gibb v. Mintline*, 175 Mich. 626.

105. *State Security Realty v. Shaffer*, 175 Mich. 634.

106. Where defendants would be compelled to convey their property for practically nothing if the contract was enforced, equity would not decree specific performance.

State Security & Realty Co. v. Shaffer, 176 Mich. 639.

107. "The remedy by specific performance is not a remedy of right, but it rests in the sound discretion of the court, and this discretion should be exercised unless the case is clear, and should never be exercised where the moving party does not come into equity with clean hands.

"The specific performance of a contract for the purchase of real estate in favor of the purchaser will be denied where the latter is a

Where a contract is made by the trustee the cestui trust is properly joined with the trustee as a co-plaintiff and the bill should show a ratification by the cestui in trust.

Where the vendor has acquiesced in the sale of the vendee's interest in a land contract, the assignee of the vendee may have the same remedy by specific performance that his assignor would be entitled to.¹⁰⁸

It is the duty of the plaintiff to make out his case by convincing evidence, and where the evidence is conflicting and the court is unable to say where the truth lies, the court will not decree specific performance.¹⁰⁹

Where the contract calls for a marketable title, to be shown by the abstract, and the abstract disclosed that the title rested upon the foreclosure of a mortgage by advertisement, but does not show the mortgage contained a power of sale, a marketable title is not shown and specific performance will not be decreed at the instance of the vendor.¹¹⁰

It has been held that where the plaintiff contracted to purchase property but refused to accept a land contract which fully complied with the terms of the preliminary contract, the transaction was there at an end and after such refusal on his part, specific performance would not be enforced.¹¹¹ See additional cases in the note.¹¹²

clever and financially irresponsible promoter and so frames the contract as to permit of protracted delays in payment, and the sellers are ignorant people of foreign extraction, and it is unlikely that any tender of payment would have been made by him except for a profitable real estate transaction, and when pressed for payment, told the vendors to sell the property to somebody else and remained inactive until after the making of the sale."

Lake Erie Land Co. v. Chilinski, 197 Mich. 214.

108. *Maday v. Roth*, 150 M. 290. *John v. McNeal*, 167 M. 157.

109. *Brodway v. Miller*, 200 Mich. 648.

110. *Ickler v. Mullen*, 200 Mich. 620.

111. *Penfield v. Schleicher*, 215 Mich. 664; *Bradley v. May*, 214 Mich. 194. Where a bill of complaint for specific performance was dismissed because plaintiff had inadequate remedy at law.

112. See Sec. 121-122 P.

CHAPTER VIII

SPECIFIC PERFORMANCE

PARTIES TO THE ACTION—MISCELLANEOUS— FORMS—BILLS OF COMPLAINT—DECREES.

- § 115. Parties to the Action.
- § 116. Specific Performance Substituted Service.
- § 117. Grantee of Vendor as Defendant.
- § 118. Specific Performance Vendor Against Assignee of Vendee.
- § 119. Specific Performance Against Assignees in Bankruptcy.
- § 120. Evidence, Practice, Miscellaneous Decisions.
- § 121. Specific Performance—Illustrative Cases—Relief Granted.
- § 122. Specific Performance—Illustrative Cases—Relief Denied.
- § 123. Specific Performance—Bill of Complaint—Agreement in Writing.
- § 124. Decree for Specific Performance of Written Contract.
- § 125. Specific Performance—Bill of Complaint—Verbal Agreement.
- § 126. Specific Performance—Bill of Complaint by Vendee Against Administrator and Heirs of Vendor.
- § 127. Bill of Complaint—Vendor Against Vendee.
- § 128. Status of Unfulfilled Land Contracts in Case of Death of One of the Contracting Parties.
- § 129. Specific Performance in the Probate Court.
- § 130. The Petition.
- § 131. The Hearing.
- § 132. Provisions for Appeal.
- § 133. Effect of Conveyance.
- § 134. Effect of Registration of Decree.
- § 135. Specific Performance by Guardians of Incompetents and Spendthrifts.
- § 136. Specific Performance by Guardians of Minors.
- § 137. Form of Petition for Specific Performance.
- § 138. Form of Order for Publication.
- § 139. Form of Proof of Service.
- § 140. Form of Proof of Publication.
- § 141. Form of Order for Specific Performance of Land Contract.
- § 142. Deed Where Executor or Administrator Conveys Pursuant to Land Contract Under P. A. 396, 1919.
- § 143. Pleadings and Briefs Used in Late Michigan Cases.

§ 115. Parties to the Action.—As a general rule the only necessary parties to an action for specific performance are the parties to the original contract and their assignees.¹

1. Russell v. Nester, 46 Mich. 291; Story Equity Pleading, Sec. 177.

Where the vendee brings an action for specific performance of a land contract, and the vendor has made a conveyance of the land to other parties, such grantees should be made parties to the bill in accordance with the general rule.²

If the vendor should become deceased after the execution of the land contract all his heirs, executors or administrators should be made parties defendant. In case the vendor has died subsequent to the execution of the contract, resort may be also had directly to the Probate court instead of to a court in chancery. A recent statute³ authorizes the Probate court to make a decree directing the executor or administrator of such deceased person's estate to convey such real estate to the person entitled thereto in all cases where if such deceased person were living, he might be compelled to execute such conveyance.

In a bill of complaint by vendee against the vendor of land attaching creditors of the vendor and other lienors are proper although not necessary parties.⁴

An attachment or execution creditor is a proper party to bill to enforce the specific performance of a land contract, if taking his claims at their face value he stands in the place of the vendor.⁵

2. *Dally v. Litchfield*, 10 Mich. 29; *Morris v. Hoyt*, 11 Mich. 9; *Bremer v. Dodge*, 28 Mich. 359; *Lambert v. Weber*, 83 Mich. 395.

3. Story Eq. Pl., Sec. 160; *Morgan v. Morgan*, 2 Wheat. 297; *Robert v. Merchant*, 1 Hare 547; *Cummins & Beecher Judicature Act*, Sec. 2160.

4. "When any person who is bound by a contract in writing to convey any real estate shall die before making the conveyance, the probate court may make a decree authorizing and directing the executor or administrator to convey such real estate to the person entitled thereto, in all cases where such deceased person, if living, might be compelled to execute such conveyance."

"At the time and place appointed for such hearing, or at such other time as the same may be adjourned to, upon proof by affidavit of the publication of the notice, the personal service thereof or waiver of such notice of hearing, the court shall proceed to a hearing, and all persons interested in the estate may appear before the probate court and defend against such petition; and the court may examine on oath the petitioner and all others who may be produced before him for that purpose."

Cummins & Beecher Judicature Act, Sec. 2160 and 2162.

5. *Horton v. Hubbard*, 83 Mich. 123.

Where a landowner agrees in writing to sell a parcel of land to a person who is described in the contract as "trustee," no trust being otherwise expressed in the instrument, a bill by the trustees and his cestui que trust against the landowner for specific performance, in which the trust is fully declared, and a conveyance to the cestui que trust prayed, is not objectionable as an attempt to enforce the execution of a parol trust.⁶

It is provided by statute that all persons who claim any interest in the subject matter of an equitable action adverse to the plaintiff may be joined as parties defendant and that all persons having a united interest must be joined on the same side as the plaintiff or the defendant, but when any person refuses to join as a party plaintiff, he may by reason of such refusal be made a party defendant under this statute. The question as to whether or not an individual should be joined as a party defendant should be tested by his interest in the subject matter of the litigation, or the relief granted, and if the attitude of the person in question is unknown and his relation to the subject matter is such that plaintiff has reason to believe he may have an interest either in the subject matter or in the relief granted, the safer practice is to join him as a party defendant.⁷

It is well settled that specific performance of a land contract may be invoked by either the vendor or the vendee,⁸ and the wife of neither need be joined as defendant, nor are they in fact proper parties to such action in cases where they have not signed the land contract sought to be enforced.⁹

6. *Bridgeman v. McIntyre*, 150 Mich. 78; *Ferres v. Snow*, 124 Mich. 559.

7. Compiled Laws 12361. In all equitable actions, all persons having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. any one refuses to join, he may made a party if his presence is nec-

essary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

8. See section 104 ante.

9. See section ante. *Solomon v. Shewitz*, 185 Mich. 620; *Phillips v. Stanich*, 20 Mich. 369; *Bucholz v. Walker*, 19 Mich. 244.

If a husband enters into a land contract without the knowledge of his wife and she afterwards conveys the land with him to a third party, she is not a proper party defendant in an action for specific performance by the original vendee,¹⁰ but if she had knowledge of the outstanding contract executed by her husband then she would be a proper party to the action.¹¹ It, of course, follows that if the vendor has conveyed the property to a third person he cannot maintain an action for specific performance of the contract.¹²

§ 116. Specific Performance Substituted Service.—The remedy of specific performance may be invoked even though the defendant is non-resident of the state and beyond the jurisdiction of the court. Our statute provides a method of substituted service and the courts have held that this method of service is sufficient to support a decree of specific performance in such cases as the defendant does not come into court. The decree may be recorded and will stand as a conveyance of the property involved.¹³

10. *Solomon v. Shewitz*, *Supra*.

11. *Solomon v. Shewitz*, *Supra*;
Dailey v. Litchfield, 10 Mich. 20.

12. *Brewer v. Dodge*, 28 Mich. 359.

13. See *Pomeroy's Equity Jur.*,
Sec. 1436.

Specific Performance—Service By Publication

Boswell's Lessee v. Otis, 9 How. 336. A bill for the specific performance of a land contract was filed in Ohio concerning land in Ohio but the defendant lived in Kentucky and service was had on him by publication as provided in the Ohio Statutes.

The court held that a state can provide by statute for service by publication in such cases. That jurisdiction is acquired in one of two ways, first as against the person of the defendant by the service of process; or secondly by pro-

cedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by a judgment beyond the property in question; it is immaterial whether the proceeding against the property be an attachment or a bill in chancery. It must be substantially a proceeding in rem; a bill for the specific performance of a land contract is not strictly a proceeding in rem, but where such a proceeding is authorized by a statute on publication it is essentially a proceeding of that character.

Felch v. Hooper, 119 Mass. 52. Bill for the specific performance of a land contract filed; defendant resided outside of the state but personal service was had upon him. Defendant claimed court had no jurisdiction.

§ 117. **Grantee of Vendor as Defendant.**—If the grantee of the vendor takes the title from the vendor for value without knowledge of the prior contract he can retain it and the vendee has no remedy against him,¹⁴ but would, of course, have his remedy in damages against the vendor.

The court held that under the statute providing that when a person is seized of an estate upon a trust, express or implied, and is outside the state and not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made and may appoint some suitable person to convey the premises; this court has adequate power to enforce the specific performance of a land contract even though the defendant resides outside the state.

Clem v. Given's Ex'r, 106 Va. 145. Defendant had entered into contract with plaintiff for the sale of certain land and he now refuses to convey. Defendant resided outside the state. Plaintiff filed a bill for specific performance. There was a statute which provided that where the title to real estate was involved and the owner lived outside the state he could be brought in by publication.

The court held that a state has a perfect right to pass such a law; that a state has control over property within its limits and the condition of ownership of real estate therein, whether the owner be a stranger or citizen state can determine the extent of a stranger's title to real estate within its limits and for the purpose of such determination may provide any reasonable method of imparting notice.

Minero v. Ross & Masterson, 138

S. W. 224. Paragraph 20: If a suit for the specific performance of a land contract be instituted by the vendee who is offering to pay the purchase price, the court having jurisdiction of the land but the defendant living in a foreign country or state outside the jurisdiction of the court; such action even though the defendant were served only with constructive process would be regarded as an action in rem rather than in personam and specific performance would be enforced.

Hollander v. Central Metal & Supply Co., 71 Atl. 442, 23 L. R. A. (N. S.) 1135. On a bill filed for the specific performance of a land contract where the defendant was a non-resident of the state and service was had by publication the defendant claimed that specific performance was an action in personam and service could not be had by publication.

The court held that under the state statute the court may order notice to be given non-resident defendants and said notice may be given by publication. The non-resident cannot be compelled to execute a deed but the court may appoint a trustee to convey the non-resident's title and to that end the proceedings are in rem and not in personam and therefore sustainable by publication.

14. *Pomeroy Equity Jur.*, 2nd Ed., Sec. 2275.

If the assignee of the vendor take a conveyance of the property with notice of the outstanding contract,¹⁵ or is not a purchaser for value¹⁶ then the vendee of the contract may enforce same against such grantee. On the question of notice it has been frequently held that possession by a party under a land contract is notice to the world of his rights under that contract,¹⁷ and that such possession may be either in person or by tenant,¹⁸ it would therefore follow that if the vendee or his tenant was in possession under the land contract any purchaser from the vendor would be charged with notice of the vendee's interest in the contract.

Unless the contract contains a covenant against assignment, on the part of the purchaser his vendee or assignee may enforce specific performance against the grantee of the vendor, as, whoever takes the land, takes it subject to the terms of the outstanding land contract.

§ 118. Specific Performance Vendor Against Assignee of Vendee.—While the grantee of the vendee of a land contract may enforce specific performance against the grantee of the vendor, such grantee of the vendor cannot enforce specific performance against the vendee's assignee, nor can the original vendor enforce specific performance against the assignee of the vendee.¹⁹

The reason for the rule is that with the assignee of the vendee there is no privity of contract nor does such assignee hold any property in trust for the vendor; but just the reverse

15. *Lovejoy v. Potter*, 60 Mich. 95; *Grunnett v. Gingras*, 77 Mich. 369; *Bird v. Hall*, 30 Mich. 374; *Pomeroy Eq. Jur.*, 2nd Ed. 2275.

16. *Rathbone v. Groh*, 137 Mich. 373; *Pomeroy Eq. Jur.*, 2nd Ed., *Supra*.

17. *Seager v. Colley*, 44 Mich. 14; *Schmidt v. Steinback*, 193 Mich. 640; *Corry v. Smalley*, 106 Mich. 260; *Woodward v. Clark*, 15 Mich. 104; *Russel v. Sweezey*, 22 Mich. 235; *Farwell v. Johnston*, 34 Mich. 342; *Dunks v. Fuller*, 32 Mich. 242;

McKee v. Wilcox, 11 Mich. 358; *Allen v. Cadwell*, 55 Mich. 8; *Hommel v. Devinney*, 39 Mich. 523; *Michie v. Ellair*, 54 Mich. 518; *Stevens v. Castel*, 63 Mich. 111; *Moore v. Kenockee Tp.*, 75 Mich. 332; *Schweiss v. Woodruff*, 73 Mich. 473; *Lambert v. Weber*, 83 Mich. 395.

18. *Corry v. Smalley*, *supra*, where the actual possession was by the tenant.

19. *Pomeroy Equity Jur.*, 2nd Ed. 2276.

is true with the vendor or his assignee who hold the property as security for the vendee and his assigns. The effect of an assignment of a land contract in violation of the express terms thereof is treated elsewhere in this work.²⁰

§ 119. Specific Performance Against Assignees in Bankruptcy.—In accordance with the principles stated in the preceding sections, an assignee or trustee in bankruptcy of the vendee is not subject to specific performance at the instance of the vendor or his assigns,²¹ but the reverse is true with the vendor or his assignee in bankruptcy whether a part or all of the purchase price has been paid, he is nevertheless, at the instance of the vendee, or his assigns, obliged to convey the property in accordance with the terms of the contract.²²

§ 120. Evidence — Practice — Miscellaneous Decisions. — Where the bill of complaint and the memorandum of the sale describes the property by street number, it is permissible to insert the correct legal description in the final decree.²³ Where the wife brought the action, but the decree is taken in favor of both husband and wife, it was amendable in the Supreme court to conform to the facts.²⁴ Where the delay beyond a stipulated time was due to the defendant's inability to furnish an abstract, such delay affords no grounds for refusal on his part to complete the sale.²⁵ Want of understanding of the terms of a contract is not a defense to specific performance so long as the plaintiff was not the cause of such misunderstanding and same was not communicated to him,²⁶ nor is conversation between defendant's agent or his attorney admissible on the question of her understanding, in the absence of plaintiff,²⁷ a motion to dismiss is the proper practice to challenge the suffi-

20. Chap. Forfeiture of Land Contracts.

21. Pomeroy Eq. Jur., 2nd Ed. 2278-2279; Pearce v. Bastable, L. R. Ch. 122-125.

22. Pomeroy Eq. Jur., 2nd Ed., Supra.

23. Baller v. Spivack, 213 Mich. 436.

24. Baller v. Spivack, 213 Mich. 436.

25. Standard Oil v. Murray, 214 Mich. 297.

26. Standard Oil v. Murray, 214 Mich. 299.

27. Standard Oil v. Murray, 214 Mich. 299.

ciency of a bill of complaint for specific performance on the ground that the plaintiff has an adequate remedy at law.²⁸

Where the contract is conceded to have been made of two separate memoranda, it was not error to exclude one from the evidence unless both were offered.²⁹

Any attempt to modify a written agreement, if such modification is made on Sunday will be disregarded and held to be void.³⁰ If language is found in a purported copy of an option not contained in the original as recorded and relied upon, such language will be disregarded.³¹

If the premises have been sold to a bona fide purchaser pending the action by vendor, the court may award a decree for damages against the defendant.³²

§ 121. Specific Performance — Illustrative Cases — Relief Granted.—We have included in the note to this section a brief digest of the late Michigan cases from Volume 189 to 213, inclusive, where the relief by way of specific performance has been granted.³³

28. *Bradley v. May*, 214 Mich. 194.

29. *Dinnen v. Bloomfield Hills Co.*, 214 Mich. 55.

30. *Watkins v. Miner*, 214 Mich. 380.

31. *Watkins v. Miner*, 214 Mich. 380.

32. *Marussa v. Timerowski*, 204 Mich. 271.

Specific Performance — Relief Granted.

33. *Hubbel v. Ohler*, 213 Mich. 664. Relief from forfeiture and specific performance granted under certain conditions.

Woodward v. Porter, 213 Mich. 314. Held bill of complaint sufficient for specific performance.

Lyle v. Munson, 213 Mich. 250. Contract followed by part performance upheld although made on Sunday. Court invoked the principle of equitable estoppel.

Bland v. Bland, 213 Mich. 549. Holding wife authorized to have antenuptial contract specifically performed.

Niemetta v. Teakle, 210 Mich. 590. Specific performance compelling execution of mortgage on land situated in other county.

Engle v. Engle, 209 Mich. 275. Partly performed oral contract specifically performed also against defendant's wife, who was a party to the agreement.

Nickerson v. Nickerson, 209 Mich. 134. Oral agreement partly performed.

Hager v. Rey, 209 Mich. 194. Involving question of tender, and laches in making payment.

McCrilles v. Sutton, 207 Mich. 58. Relief granted in contract between foster parents and plaintiff as against heirs at law of estate of said foster parents.

Pendergart v. Pendergart, 206

Mich. 526. Parol contract involving acts and declarations of deceased persons, family dealings, etc.

Marussa v. Temerowski, 204

Mich. 271. Where plaintiffs were entitled to decree but defendants could not perform because property had been sold to bona fide purchaser, decree for damages held equitable.

Kendall v. Chase, 203 Mich. 660.

Involving conveyance of farm in consideration of plaintiff's support during her natural life as evidenced by agreement. Plaintiff granted relief even though it exhaust the land in so doing.

George v. Schuman, 202 Mich. 241. Involving option and adequacy of consideration.

Pearson v. Gardner, 202 Mich. 360. Contract itself not sufficient under statute of frauds, but vendees had paid part of the purchase price and taken possession and exercised acts of possession and ownership.

Fowler v. Isbell, 202 Mich. 572. Oral contract for sale of land but plaintiff had performed her part under section 11979, 3 Comp. Laws 1915.

Barker v. Finley, 200 Mich. 166. This involved credit for \$1,000.00 on contract, which \$1,000.00 had not been paid and which was never intended to be paid.

Kerwin Machine Co. v. Baker, 199 Mich. 122. Involving verbal agreement in connection with written contract, which verbal terms could not be complied with. Court held the written contract was definite in its terms and not changeable by parol evidence.

Gates v. McLaulin, 199 Mich. 438.

Specific performance will be decreed where there has been an entry upon land and part performance of the contract. *Green v. Reder*, 199-594.

The fact that the real estate has increased in value is not a sufficient ground for denial of a decree for specific performance and equity may decree the performance of an agreement to execute a land contract. *Ogooshevitz v. Arnold*, 197-203.

Specific performance of an oral agreement for a lease will be decreed where the evidence showed plaintiff made certain improvements and rented additional buildings, which, according to the oral agreement, would entitle plaintiff to an extension of the lease for a certain period. *Charlet v. Teackle*, 197-426.

A vendee appearing at the appointed time and place ready and willing to pay, and vendor failed to appear a sufficient tender was made to entitle vendee to specific performance of a land contract, and it was not necessary that the vendee tender a deed to be executed by the vendor. *Fraser v. Hovey*, 195-161.

Specific performance will be decreed of a lease of premises which gives plaintiff the right to purchase, where he made valuable improvements on the premises and built up a good business, and it would be hard to purchase other premises nearby, and difficult to compensate plaintiff in dollars, although value of premises had increased since execution of lease. *Nowicki v. Kopeczak*, 195-678.

Specific performance of a land contract was decreed and a divi-

§ 122. **Specific Performance — Illustrative Cases — Relief Denied.**—We have included in the note to this section a brief digest of the late Michigan cases from Volumes 189 to 213, inclusive, where the relief by way of specific performance has been denied.³⁴

sion of the balance of the purchase price ordered where the vendors, husband and wife, had both died, and the representatives of their estates were in disagreement as to division of the fund. *Flammer v. Cullen*, 194 Mich. 585.

Specific performance of an oral agreement to convey defendant's farm in consideration of services, etc., will be granted. *Woodward v. Walker*, 192-188.

Specific performance of a contract, fully performed on one side by plaintiffs, to convey certain premises if plaintiffs would give up their farm, and move into defendant's home and make certain improvements, was decreed, although it was not in writing. *Friend v. Smith*, 191-99.

Specific Performance—Relief Denied.

34. *Silver v. Shulman*, 213 Mich. 211. Relief denied because contract made on Sunday.

Morrison v. Meister, 212 Mich. 516. Contract signed by only one of several joint owners.

Sayers v. McKeever, 211 Mich. 249. Relief denied. Plaintiff had failed to pay taxes on property and had no agreement relative to taxes. She refused to pay same and court held title encumbered by lien.

Woods Land Co. v. Beeman, 211 Mich. 360. Option not enforced, contract procured by overreaching on plaintiff's part.

Schoenfeld v. Kemter, 211 Mich. 464. Relief denied; judgment had been rendered by Circuit Court Commissioner and writ of restitution granted previous to filing of bill of complaint. Plaintiff held no equities.

Slatkin v. Schumer, 210 Mich. 513. Relief denied. Bill dismissed because time had expired, and other parties acquired interests in the property.

Harrison v. Eassom, 208 Mich. 685. Denied because acts of part performance by plaintiffs and permitted by defendants were not of kind to create strong equities in plaintiff's favor.

Oakman v. Esper, 206 Mich. 315. Denied when plaintiff had defaulted and property had been sold to others.

Lozon v. McKay, 203 Mich. 364. Vendee denied relief after forfeiture of land contract unless relieved of forfeiture (decree conditional)

Law v. McKechnie, 202 Mich. 284. Involving option to purchase during term of lease. Specific performance denied because tender of full amount and demand for deed had not been made according to terms.

Zigen v. Rosler, 200 Mich. 328. Involves contract for sale of land held by husband only.

Bradway v. Miller, 200 Mich. 648. Defendant bought on condition that the abstract show a merchantable title. Same not shown; plaintiffs

§ 123. Specific Performance—Bill of Complaint Agreement in Writing.

(Address and Introduction.)

1. That on or about the.....day of....., 19....., this plaintiff and A. B. entered into a certain contract in writing for the sale by the said A. B. to plaintiff of that certain piece or parcel of land, situate in (describe the land), upon the following terms, and conditions: (Here set forth the essential terms of the contract, especially the provisions of the contract which have been violated by the defendant), a true copy of which contract is hereto attached, marked Exhibit "A" and made a part hereof.

2. And that this plaintiff has in all respects carried out his part of the said contract and has made payments on the said purchase money therein mentioned and the interest thereon as follows: (State payments and time of each), and that on the day of....., 19....., there was owing on the said agreement by this plaintiff to the said A. B. for principal and interest the sum of.....dollars and no more, and that on the last mentoned day at.....in the County of

denied right to foreclose; contract rescinded and defendants decreed the money they had paid thereon.

Where time of payment is made the essence of the contract, specific performance was denied the vendee, who had taken no steps until five months after having received notice of termination of the agreement to extend time for payment to remove certain restrictions. *Tatton v. Bryant*, 198-515.

Specific performance will be denied in favor of a purchaser where he is a clever and financially irresponsible promoter and so framed the contract that it permits of delays in payment, and the sellers are ignorant foreign people and purchaser does not come in equity with clean hands. *Lake Erie Land Co. v. Chilinski*, 197-215.

Where plaintiff refused to accept a form of contract in accord with a previous memorandum of agreement entered into with the defendant and allowed the defendant to sell to another person, plaintiff was not entitled to specific performance. *Ickler v. Mullen*, 196-617.

Specific performance will be denied where the legal and equitable rights of the real parties in interest would be disregarded, in enforcing a parol agreement of the trustee to convey on the tender of the agreed purchase price. *Canton v. Irvine*, 194-165.

Specific performance will not be granted where the court can not, on both sides, enforce the contract in all its material parts. *Blilansky v. Hogan*, 190-463.

....., in this state, this plaintiff tendered and offered to the said A. B. personally the said sum of.....dollars in lawful money of the United States, and then and there requested the said A. B. to receive and accept the same in payment of the amount due on the said contract and agreement.

3. And this plaintiff then and there had and presented to the said A. B. the draft of a deed of conveyance of the said land in fee simple to plaintiff and then and there requested the said A. B. to execute the same and to deliver the same when executed to this plaintiff, but so to do the said A. B. although then well able to convey the said land to this plaintiff and to give this plaintiff a good title thereto, and although the amount so tendered and offered by this plaintiff to him was ample and sufficient to pay and satisfy the full amount due and owing to him on the said agreement, the said A. B. then and there absolutely refused to comply with this plaintiff's said reasonable request, and absolutely refused to receive or accept the said money so tendered and offered to him as aforesaid on the said agreement, although making no claim that the same was insufficient in amount, and absolutely refused to make or execute the said deed of conveyance, or any deed of conveyance whatever, of the said land to this plaintiff, and the said A. B. has ever since that time continually refused and still does refuse to accept or receive the said money and to convey the said land to this plaintiff in any manner, as in equity and good conscience he ought to have done.

1. Wherefore, plaintiff prays:

(If answer under oath is desired so state.) If not specifically requested will be deemed waived.

2. And that said A. B. may be decreed to specifically perform his part of the said agreement, this plaintiff being ready and willing, and hereby offering to specifically perform the same upon his part.

3. And that the said A. B. may come to an account with this plaintiff touching the amount due and owing by this plaintiff to him, the said A. B., on the said agreement, this plaintiff being ready and willing and hereby offering to pay him the full amount that shall be found due to him on such an accounting, and this plaintiff asks leave to pay and deposit the same with

the register of this court for the said A. B., to be paid to him according to the order and direction of this court.

4. And that, upon such payment to the said A. B., or to the register of this court for the said A. B., he, the said A. B., be decreed to convey to this plaintiff by a good and sufficient deed of conveyance in the law, duly executed and acknowledged, all and singular the said land in fee simple.

5. And that upon such payment to the said A. B. or to the register of this court as aforesaid, this plaintiff be decreed to be the owner of the said land and premises, and of each and every part and parcel thereof, in fee simple, and that the said A. B. be decreed to be divested of all right, title and interest therein, and that this plaintiff have leave to cause such decree to be recorded in the office of the register of deeds of the said County of.....as a conveyance of all the said land and premises from the said A. B. to this plaintiff.

6. And that the said A. B. thereupon deliver possession of all and singular the said land and premises to this plaintiff.

7. And that this plaintiff may have such further, other or different relief in the premises as shall be agreeable to equity and good conscience.

And the plaintiff will ever pray, etc.

(Signature of Plaintiff.)

(Signature of Counsel.)

§ 124. Decree for Specific Performance of Written Contract. (Caption.)

At a session of said court held in the courthouse at the City of....., State of Michigan.

Present the Honorable.....,

Circuit Judge.

This cause coming on to be heard upon the pleadings and proofs in open court and the court having heard the arguments of counsel for the respective parties and being fully advised in the premises and it appearing to the court that a good title can be made by the plaintiff to the premises described in the agreement between the parties to this cause, dated the..... day of.....

It is therefore ordered, adjudged and decreed and this court does hereby order, adjudge and decree that said agreements

so made and entered into by and between the plaintiff and the defendant and duly proved in this cause, be specifically performed; and,

It is further ordered, adjudged and decreed that the plaintiff execute and deliver to the defendant a proper and sufficient conveyance of the real estate described in said agreement between the parties, to-wit: (Here insert legal description of premises).

It is further ordered, adjudged and decreed that the defendant upon the tender or delivery to him of such conveyance pay unto the plaintiff the sum of.....dollars, the balance of the purchase money of said premises together with interest thereon at the rate of 6% from the.....day of.....

It is further ordered, adjudged and decreed that the plaintiff pay to the defendant the cost of this suit to be taxed and that the plaintiff shall have execution against the defendant for said sum of.....dollars, the balance of said purchase money aforesaid together with interest and for the cost to be taxed as aforesaid according to the rule and practice of the courts and further that either of the parties is at liberty to apply to this court as the action may require in the carrying out of this decree.

Circuit Judge.

§ 125. Specific Performance — Bill of Complaint — Verbal Agreement.

(Address and Introduction.)

1. That on or about the.....day of..... one A. B. was the owner in fee simple of all that (here describe the land), and being such owner, the said A. B. made a verbal agreement with this plaintiff whereby the said A. B. agreed to sell and convey to this plaintiff all said land and premises in fee simple for the sum of.....dollars, to be paid as follows: (Here state specifically the terms of payment), together with interest at the rate of.....per cent. per annum, payable annually, on the whole sum from time to time when paid, and to give to this plaintiff immediate possession thereof. Said agreement further provided that this plaintiff was to pay all

the taxes and assessments that should thereafter be assessed on said land; and this plaintiff thereby agreed to purchase the said land, to pay for the same in the same manner aforesaid, and to comply in all respects to the terms and conditions to the foregoing verbal agreement, but no written agreement or memorandum was made or signed by the said A. B. or by this plaintiff.

2. And that in pursuance of the said agreement the said A. B. then on or about the said day of.....19....., delivered possession of the said land and premises to this plaintiff, who then entered into possession and occupation thereof and of the whole thereof, and ever since that time this plaintiff has been and still is in such possession and occupation in accordance with, and relying upon the said agreement.

3. And that in accordance with the said agreement this plaintiff has paid to the said A. B., the said sum of.....dollars, parcel of said purchase money at the expiration of one year from said first mentioned day, and the said sum of.....dollars, parcel of said purchase money at the expiration of two years therefrom, and also paid the interest as provided in and by the said verbal agreement, and the said A. B. accepted such payments so made as payments made in accordance with said agreement, and this plaintiff has also paid and satisfied all taxes and assessments that have been assessed on said land since the time of the making of the said agreement in accordance therewith, and has hitherto fully performed the said agreement on his part.

4. That during the time this plaintiff has been in possession of said land as aforesaid, and relying wholly upon said agreement, he has, at his own expense, built and erected thereon the following improvements (here state in detail the character of the improvements made), at an expense of.....dollars, and has treated, managed and used said land as his own property, all with the knowledge and consent and acquiescence of said defendant A. B.

5. That this plaintiff has fully performed his portion of said agreement, and has complied with the terms thereof, and on the day of....., plaintiff applied to the said A. B. and offered then and there to pay him the sum of.....

dollars, being the remainder of the purchase money provided by said contract, together with all interest thereon, and then and there requested the said A. B. to receive and accept the same to convey the said land and premises to this plaintiff by a good and sufficient deed of conveyance, as in and by the said agreement he had agreed to do; and this plaintiff then also presented to the said A. B. the draft of a deed of conveyance in fee simple, and in the presence of a notary public, whose presence was procured by this plaintiff; this plaintiff then requested the said A. B. to accept the said money so offered as aforesaid and to execute the said deed and to acknowledge the execution thereof before the said notary, and this plaintiff well hopes that the said A. B. would have then received and accepted the said money so tendered and offered, and would have executed and acknowledged the said deed, as in justice and equity, he ought to have done, but so to do the said A. B. then utterly refused, and thenceforward has continually refused and still refuses, although he, the said A. B., still holds the title to the said land in his own name and is well able to convey the same as aforesaid.

6. That this plaintiff has always been ready and willing to sell his right and willing to perform this said agreement fully and specifically, and hereby tenders to the said A. B., defendant, all moneys, principal as well as interest, which may be found to be due and owing him on said agreement.

Wherefore, plaintiff prays:

1. The said A. B. may be decreed to specifically perform the said agreement and contract on his part.

2. That an account may be taken of the amount due and owing by this plaintiff to the said A. B. on said agreement for the purchase money aforesaid, with accrued interest thereon, and plaintiff hereby offers to pay to the said A. B. forthwith the full sum found to be owing thereon, and in case the said A. B. shall refuse to receive or accept the same, plaintiff prays leave to deposit said payment with the register of this court to be paid to the said A. B. as this court shall direct.

3. That upon the payment to the said A. B., or to the register of this court, this plaintiff be decreed to be the owner of said lands and premises, and of each and every part thereof, and

that such decree may stand as a conveyance of said property, and that plaintiff shall have leave to cause such decree to be recorded in the office of the register of deeds of..... County, as a conveyance to him of said land and premises.

4. That this plaintiff may have such further or such other or different relief, as shall be agreeable to equity and good conscience and the plaitniff will ever pray.

Signature of Plaintiff.

Attorney for Plaintiff.

§ 126. Specific Performance—Bill of Complaint by Vendee Against Administrator and Heirs of Vendor.

(Address and Introduction.)

1. That on or about the.....day of.....19...., this plaintiff entered into a written contract during the lifetime of one A. B., then being the owner of his own right in fee simple of that certain piece or parcel of land (here describe it), for the sale of said land to this plaintiff upon the following terms and conditions: (Here set forth the essential terms of the contract, especially the provisions of the contract which have been violated by the defendant), a true copy of which contract is hereto attached, marked Exhibit "A" and made a part hereof.

2. That this plaintiff has fully performed his part of the said agreement up to the time of the death of the said A. B. and has duly paid the taxes assessed on the said land and on every part thereof and (state such items of performance by plaintiff as are material).

3. That after the making of the said agreement and on or about the day.....day of....., 19....., the said A. B. died intestate and that during his lifetime, he, the said A. B., never made any conveyance of the said land or any part thereof to this plaintiff and died seized thereof, and that the said A. B. left a widow, C. D., and two children, viz.: E. F. and L. H., all of whom are minors under the age of twenty-one years, and who are the only heirs of the said A. B., and that S. K. of.....has been by the Probate Court of the county of....., duly appointed administrator of the estate of

the said A. B., deceased, but no person as yet has been appointed guardian of the said minor children, as appears by the records and files of the said Probate Court, whereto reference is prayed.

4. That this plaintiff is desirous of obtaining a conveyance of the said lands and real estate pursuant to the terms of said agreement between himself and the said A. B., deceased, and is ready and willing and hereby offers to pay for the same the full amount of the purchase money now remaining unpaid thereon, with all accrued interest, as provided in the said agreement.

5. That he has made application to the said C. D., the widow of the said A. B., deceased, and has ascertained that she is willing to release her right of dower in the said land and premises upon having paid to her an amount equal to the present value of her said right of dower. But by reason that the said A. B. died intestate and his heirs aforesaid are not of full age, there is no person who has legal authority to execute a deed whereby to convey the said land and premises in full to this plaintiff.

WHEREFORE, Plaintiff prays:

(If answer under oath is desired so state.)³⁵

I. That the said defendants may be decreed to specifically perform the said agreement entered into as aforesaid between the said A. B. and this plaintiff.

II. That an account may be taken of the amount due and owing by this plaintiff upon the said agreement, and that this plaintiff have leave to bring the amount so found to be owing by him into this court and deposit the same with the register of this court, to be paid to the said defendants in such manner as this court shall by its decree direct.

III. That upon depositing the amount so found to be due as aforesaid with the register of this court, this plaintiff be decreed to be the owner of the said land and premises in his own right, in fee simple, in the same manner as if the same had been conveyed to him by the said A. B. in his lifetime,

35. In case answer under oath is not specifically requested it will be deemed waived. World Mfg. Co. v. Kent Circuit Judge, 115 Mich. 652; Chancery Rule 25.

in the manner provided in the said agreement, and that this plaintiff have leave to cause such decree to be recorded in the office of the register of deeds of the county of....., as a conveyance to him of the said land and premises.

IV. And that this plaintiff may have such further or such other relief in the premises as shall be agreeable to equity and good conscience.

And the plaintiff will ever pray, etc.

(Signature of Plaintiff.)

(Signature of Counsel.)

§ 127. Bill of Complaint—Vendor Against Vendee.

(Address.)

(Introduction.)

I. That the plaintiff, A. B., is the owner in fee simple in his own right of the following described real estate, to-wit: (Here described premises) did on the.....day of..... enter into an agreement in writing with one C. D., whereby the said C. D. agreed to purchase said real estate and wherein the plaintiff agreed to sell and said C. D. agreed to buy such real estate according to the terms and conditions of such agreement, a true copy of which is hereto attached marked "Exhibit A" and made a part hereof.

II. That said C. D. paid to plaintiff the sum of..... dollars, part of said purchase money at the time of the execution of said agreement and plaintiff delivered an abstract of his title to the said premises to the said C. D. and has always been ready and willing to perform his part of said agreement and has repeatedly communicated such fact to the said C. D. and on being paid the remainder of his said purchase money with interest, to convey said premises to the said C. D., his heirs and to let him into possession of said real estate.

III. That notwithstanding that plaintiff has always been ready and willing to perform said agreement and has furnished the said C. D. with an abstract of title showing a marketable title in plaintiff, the said defendant has wholly failed, neglected and refused to carry out his part of agreement.

IV. That plaintiff hereby offers to specifically perform said agreement on his part on being paid the said purchase money and interest and to execute a proper conveyance of said de-

scribed premises to the said C. D. and to let him into possession of the same according to the tender and effect of said agreement.

V. That the value of the subject matter of this litigation is in excess of \$100.00 and that this plaintiff is without remedy in the premises except in a court of equity.

WHEREFORE plaintiff prays:

1. That the said C. D., defendant, may be compelled by a decree of this Honorable Court specifically to perform said agreement with plaintiff and to pay the plaintiff the remainder of said purchase money with interest on the same from the time said purchase money ought to have been paid.

2. That plaintiff shall have such other and further relief as equity may require.

§ 128. Status of Unfulfilled Land Contracts in Case of Death of One of the Contracting Parties.—When a person who has entered into a contract to sell real estate and thereafter dies or whenever a person who has entered into such a contract shall be adjudged insane, incompetent or a spendthrift, before deeds or conveyances have been executed, the guardian of such person or the trustee or executor under the will, or the administrator of the estate, as the case may be, is authorized and empowered to execute, duly acknowledge and deliver deeds or conveyance of the contracted premises, pursuant to the terms of such contract with like effect as if the party contracting to convey had himself executed and delivered such deeds or conveyance.

In case a deed is made under the authority of this statute, it should contain a reference to the date and respective parties to the contract in pursuance of which it purports to have been made, and a copy of the original contract under which the grantee named in such deed or conveyance, makes this claim and if any assignment of the contract has been made, under which such grantee claims, such assignment shall be annexed to it and embodied in every such deed or conveyance and shall be deemed part and parcel thereof and as such shall be recorded therewith. If the purchaser of the premises or his assignee

shall have become deceased, the deed or conveyance for the contracted premises may be issued in the name of such deceased person and a copy of the contract may be executed and issued to and in the name of such deceased person and when so executed and issued shall have the same effect as though it had been executed and delivered during the lifetime of such person or his assigns.³⁶

§ 129. Specific Performance in the Probate Court.—A recent statute of this state provides that in case of the death of the vendor of a land contract, his administrator, executor or trustee under the will, shall have full authority to convey such land contract, pursuant to the terms of such contract, with like effect as if the party contracting to convey had himself executed and delivered such deed or conveyance. In such cases it is, therefore, unnecessary to apply to the Probate court to secure specific performance of the contract.³⁷ Nevertheless, the statutory provisions authorizing the Probate court in certain cases to award specific performance of a land contract have not been repealed and in event the administrator, executor or trustee under the will of the deceased person refuses to convey, pursuant to the terms of the original contract, for the sale of lands left by the decedent, resort may be had to the Probate court for the purpose of specifically enforcing such contract.³⁸

This is an additional remedy given to the vendee or his assigns, but does not in any way exclude the jurisdiction of the court of equity to decree such relief.³⁹

§ 130. The Petition.—On the presentation of a petition by any person claiming to be entitled to such conveyance from an executor or administrator or a petition of such executor or administrator, setting forth the facts upon which such claim is predicated, the judge of probate shall make an order appointing the time and place for hearing of such petition, which order shall be served by publishing once each week for three

36. Act 396 Public Acts 1919.

37. Act 396 P. A. 1919.

38. Sec. 14038 to 14046, Compiled

Laws of 1915.

39. Sec. 14043, Compiled Laws of 1915.

successive weeks before the time fixed for such hearing in such newspapers in this state as the court may direct, or cause a copy of the order to be personally served upon the heirs-at-law at least fourteen days before the day of hearing.⁴⁰

§ 131. The Hearing.—At the time and place appointed for such hearing or at such time as the same may be adjourned to, upon proof by affidavit of the due publication of the notice, the court shall proceed to a hearing and all persons interested in the estate may appear before the Probate court and defend against such petition, and the court may examine the petitioner and all others who may be produced before him for that purpose.

If after a full hearing upon such petition and examination of the facts and circumstances of such claim, if the judge of probate shall be satisfied that the grantee in such contract is entitled to a conveyance of the real estate described in such petition, according to the provisions of this chapter, he shall thereupon make a decree authorizing and directing the executor or administrator to make and execute a conveyance thereof to such grantee.⁴¹

§ 132. Provisions for Appeal.—The statute provides that any person interested may appeal from such decree to the circuit court of such county as in other cases, but if no appeal shall be taken from such decree within the time limited by law or if such decree be affirmed on appeal, it shall be the duty of the executor or administrator to execute the conveyance according to the direction contained in such decree and a certified copy of the decree shall be recorded with the office of the register of deeds in the county where the land lies, and shall be evidence of the correctness of the proceeding and of the authority of the executor or administrator to make the conveyance.⁴²

§ 133. Effect of Conveyance.—It is further provided that every conveyance made in pursuance of the decree of probate court or the court of chancery, as provided in this chapter,

40. Sec. 14039 C. P. L., Compiled Laws, Sec. 13781.

42. Sec. 14042 Compiled Laws 1915.

41. Sec. 14041 Compiled Laws 1915.

shall be effectual to pass the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance.⁴³

§ 134. Effect of Registration of Decree.—The statute also provides a copy of the decree for the conveyance made by the Probate court, duly certified and recorded in the register of deeds office in the county where the land lies, or a copy of the decree of the court of chancery for that purpose, duly certified by the clerk of the court and recorded as aforesaid, shall give the person entitled to such conveyance the right to the possession of the lands contracted for, and to hold same according to the terms of the intended conveyance.⁴⁴

§ 135. Specific Performance by Guardians of Incompetents and Spendthrifts.—“When any person who is bound by contract in writing to convey real estate, shall subsequently become insane, incompetent or a spendthrift, and a guardian shall have been duly appointed for such person, before the making of the conveyance of such real estate, the Probate court may make a decree authorizing and directing such guardian to convey such real estate to the person entitled thereto, in all cases where such ward, if competent, might be compelled to execute such conveyance.”⁴⁵

“All the proceedings in such cases shall conform as nearly as possible to the statutes authorizing the specific performance by executors and administrators of the contracts of deceased persons for the conveyance of real estate as contained in this chapter.”⁴⁶

§ 136. Specific Performance by Guardians of Minors.—Whenever in the distribution or partition of the estate of any person, whether such person died testate or intestate, any moneys due or to become due upon a contract in writing for the sale of real estate made by such deceased in his lifetime, or any such contract or lands therein described shall be assigned or set off to any minor, the probate court having jurisdiction

43. Sec. 14043 Compiled Laws 1915.

45. Sec. 14050 Compiled Laws of 1915.

44. Sec. 14045 Compiled Laws 1915.

46. Sec. 14051 Compiled Laws of 1915.

of the estate of such minor, may make a decree authorizing and directing the guardian of such minor to convey such real estate to the person entitled thereto, in like cases, and upon the presentation of a like petition, either by the person entitled to such conveyance, or by the guardian of such minor, and the same proceedings shall thereupon be had, and with like effect as herein provided for conveyance by executors and administrators.⁴⁷

The guardian of any such minor may, in the cases provided for in the last section, embrace any number of such contracts that may have been so assigned and set off to such minor, in one petition, and such probate court, on the hearing of such petition, may decree a conveyance of the real estate pursuant to the terms of such contracts, to the several persons entitled thereto in the same manner, and with like effect as hereinbefore provided.⁴⁸

§ 137. Form of Petition for Specific Performance.

STATE OF MICHIGAN

THE PROBATE COURT FOR THE COUNTY OF.....

To the Probate Court for said County:

In the Matter of the Estate of.....

Deceased.

I, ... respectfully represent that I reside in the.....of.....in said county, and am interested in said estate and make this petition as.....

I further represent that said deceased, on the.....day of....., A. D. 19....., entered into a contract with..... wherein.....agreed to convey, upon the terms and conditions therein mentioned, a copy of which contract is hereto attached marked "Exhibit A" and made a part hereof, the following described real estate, to-wit:.....

I further represent that said deceased died on the.....day of....., A. D. 19....., without making the conveyance required by such contract, and that.....has been duly appointed.....of said estate.....

47. Sec. 14048 Compiled Laws
1915.

48. Sec. 14049 Compiled Laws
1915.

I further represent that there has been paid upon said contract the following sums, at the dates mentioned, to-wit:.....
.....and that there is now due and unpaid upon said contract the sum of.....dollars, upon the payment of which sum I will be entitled to a conveyance of said lands by the terms of said contract.

I further represent that I am prepared and willing to pay said sum, and am ready and hereby offer to perform all the requirements and conditions of said contract on my part to be performed, as said court shall direct.....

I further represent that the names, relationship, ages and residences of the heirs-at-law of said deceased and other persons interested in said estate, as I am informed and believe, are as follows:

Name	Relationship	Age	Residence
------	--------------	-----	-----------

.....
I therefore pray that a specific performance of said contract be decreed, and that the.....of said estate be authorized and directed to make and execute conveyance of the real estate described in said contract to me, upon the terms and conditions therein mentioned.

.....
P. O.

STATE OF MICHIGAN }
County of.....} ss.

On this.....day of....., A. D. 19....., before me personally appeared the above named petitioner, who being duly sworn says that.....has.....read the foregoing petition by.....signed and knows the contents thereof, and that the same is true of.....own knowledge, except as to the matters therein stated to be upon.....information and belief, and as to those matters.....believes it to be true.

.....
Notary Public.....County, Mich.

My commission expires.....19.....

§ 138. Form of Order for Publication.

STATE OF MICHIGAN
THE PROBATE COURT FOR THE COUNTY OF.....

At a session of said court, held at the probate office in the
.....of.....in said county, on the.....day
of....., A. D. 19.....

Present, Hon.....Judge of Probate.

In the Matter of the Estate of.....

Deceased.

.....having filed in said court.....
petition praying that the.....of said estate be author-
ized and directed to convey certain real estate in pursuance
of a certain contract made by said deceased in.....lifetime.

It is Ordered, That the.....day of....., A. D.
19....., at ten o'clock in the forenoon, at said probate office, be
and is hereby appointed for hearing said petition;

It is Further Ordered, That public notice thereof be given
by publication of a copy of this order, for three successive
weeks previous to said day of hearing, in the.....a
newspaper printed and circulated in said county.

A true copy.

.....Judge of Probate.

.....Register of Probate.

§ 139. Form of Proof of Service.

STATE OF MICHIGAN
THE PROBATE COURT FOR THE COUNTY OF.....

In the Matter of the Estate of.....
County of.....ss.

.....being duly sworn, says: I served upon
.....a copy of the order, of which the foregoing is a
true copy, on the.....day of....., A. D. 19....., at
the.....of.....in said county, by delivering the
same to.....personally.....

Subscribed and sworn to before me this.....day of
....., A. D. 19.....

.....
Notary Public,.....County, Michigan.

My commission expires.....19.....

§ 140. Form of Proof of Publication.

STATE OF MICHIGAN
THE PROBATE COURT FOR THE COUNTY OF.....
County of.....ss.

.....being duly sworn, says:
I am the.....printer of.....a news-
paper printed and circulated in said county. The annexed is a
printed copy of a notice which was published in said paper
on the following dates, to-wit:

.....A. D. 19.....	A. D. 19.....
.....A. D. 19.....	A. D. 19.....
.....A. D. 19.....	A. D. 19.....

Subscribed and sworn to before me this.....day of
....., A. D. 19.....

.....
Notary Public.....County, Mich.
My commission expires.....19.....

§ 141. Form of Order for Specific Performance of Land Contract.

STATE OF MICHIGAN
THE PROBATE COURT FOR THE COUNTY OF.....

At a session of said court, held at the probate office in the
.....of.....in said county, on the.....day
of....., A. D. 19.....

Present, Hon.....Judge of Probate.
In the Matter of the Estate of.....

Deceased.
.....having been appointed for hearing the
petition of.....praying that the.....of said
estate be authorized and directed to convey certain real estate
in said petition described to said petitioner, in pursuance of a
certain contract made by said deceased, and due notice of the
hearing on said petition having been given as directed by said
court, the said petitioner appeared.....

It appearing to the court, that.....has
been duly appointed.....of said
estate.....

And it further appearing, after a full hearing upon said petition and examination of the facts and circumstances of the claim of said petitioner, and that deceased did, on the..... day of....., A. D. 19....., make and enter into a certain contract with.....said petitioner for the conveyance of the following described real estate, to-wit:.....and that said petitioner is now entitled to a conveyance thereof upon paying the sum of.....dollars, balance of the purchase price of said real estate.....

It is Ordered, That upon the petitioner paying said sum of money as aforesaid the.....of said estate be and..... hereby authorized, empowered and directed to make, execute, acknowledge and deliver a sufficient conveyance in law, in fee simple, of said real estate, to said petitioner....., ...heirs and assigns, forever, and of all the estate, right, title and interest, which the said deceased had therein at the time of.....death, together with the appurtenances thereunto belonging, in pursuance of the statute in such case made and provided.

.....
Judge of Probate.

§ 142. Deed Where Executor or Administrator Conveys Pursuant to Land Contract Under P. A. 396, 1919.

This Indenture, Made this.....day of....., A. D. 19....., by and between.....administrator of the estate of....., hereinafter referred to as party of the second part.

Witnesseth, That Whereas, the said..... (Here name decedent), on the.....day of....., A. D. 19....., contracted in writing to sell and convey to party of the second part for the sum of.....Dollars, the real estate hereinafter described, said contract being in words and figures, as follows, to-wit: (Here copy in verbatim the complete contract.)

And Whereas, there is at this date unpaid on said contract the sum of.....Dollars.

And Whereas, the party of the first part has been duly appointed by the Probate Court for the County of.....,

State of Michigan, administrator (or executor, as the case may be), of the estate of said....., and has duly qualified as such.

Now, therefore, the said party of the first part, in consideration of the payment of the balance of said purchase price upon said contract, to him in hand paid by said party of the second part, to-wit: the sum of.....Dollars, receipt whereof is hereby confessed, does by these presents sell and convey to the said party of the second part and to his heirs and assigns forever all the right, title and interest of the said..... (here name decedent), in and to the said real estate, to-wit: (Here describe real estate), together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining;

TO HAVE AND TO HOLD the said premises as above described, with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

In Witness Whereof, said party of the first part has hereunto set his hand and seal the day and year first above written.

.....
.....
of the estate of.....
.....

Signed, Sealed and Delivered in Presence of

.....
.....

STATE OF MICHIGAN, }
County of..... } ss.

On this.....day of.....in the year one thousand nine hundred and....., before me.....in and for said County, personally appeared.....of the estate of.....to me known to be the same person described in, and who executed the within instrument, who acknowledged the same to be.....free act and deed.

.....
.....

§ 143. Pleadings and Briefs Used in Late Michigan Cases Involving Specific Performance.—Continued.

BIRNEY v. READY, 216 Mich., page 7—

- (a) Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer and Cross-Bill.
- (d) Brief for Plaintiff.
- (e) Brief for Defendant.
- (f) Holding of the Court.

LYLE v. MUNSON, 213 Mich. 250—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer of Defendant.
- (d) Exhibit "A".
- (e) Intervenor's Bill of Complaint.
- (f) Answer to Intervenor's Bill of Complaint.
- (g) Opinion of the Court.
- (h) Decree of the Court.
- (i) Authorities Cited by Plaintiff—Brief for Plaintiff.
- (j) Authorities Cited by Defendant—Brief for Defendant.

BIRNEY v. READY, 216 Mich., page 7—

(a) Statement of Fact.—The plaintiff in this case filed a Bill of Complaint praying for specific performance of a certain contract. Defendants filed an answer and cross-bill setting forth that they had purchased the property from the feeholder and also from the plaintiff and prayed to be decreed sole owners. A decree was granted in the lower court to the defendant. The plaintiffs appealed. This appeal was affirmed by the Supreme Court.

(b) Bill of Complaint.—(Caption.)—Comes now, Francis J. Birney and Timothy A. Birney and respectfully represent unto the court:

I. That they are each of the age of twenty-one years and upwards, citizens of the United States of America and residents of the County of Berrien, State of Michigan.

II. That heretofore, to-wit, on the 23rd day of November, 1914, these plaintiffs and F. S. Clafin and Ella M. Clafin, husband and wife, made and entered into a certain agreement and contract in writing for the sale by the said F. S. Clafin and Ella M. Clafin to these plaintiffs of that certain piece or parcel of land situate in the City of Niles, County of Berrien and State of Michigan, and described as follows, to-wit:

Lot twenty-five of E. Lacey's Addition to the City of Niles and lot twenty-four, except the East two feet thereof of E. Lacey's Addition to the City of Niles, according to the recorded plat thereof, with the privileges and appurtenances thereunto belonging; also, the following personal property: All the furniture, carpets, pictures and frames, plated ware and utensils of every name and nature and all personal property then situate in said hotel, except certain personal property reserved by J. S. Johnson and Sallie Johnson.

III. That said contract is in words and figures as follows:

Exhibit I.—“Articles of Agreement, made and concluded this 23rd day of November, in the year 1914, between F. S. Claflin and Ella M. Claflin, husband and wife, parties of the first part, and Francis J. Birney and Timothy A. Birney, parties of the second part,

Witnesseth, that the said parties of the first part for their heirs, executors, administrators, in consideration of the money to be paid and the covenants as herein expressed to be performed by the said parties of the second part, hereby agree to sell and convey to the said second parties all the following described land situated in the City of Niles, County of Berrien and State of Michigan, and described as follows, to-wit:

Lot twenty-five (25) of E. Lacey's Addition to the City of Niles and lot twenty-four (24), except the east two (2) feet of Lacey's Addition to the City of Niles, according to the recorded plat thereof, with the privileges and appurtenances thereunto belonging;

And the said parties of the first part in consideration of the money to be paid and the covenants to be performed by the said second party hereby agree to sell to the said second party all the furniture, carpets, pictures and frames, plated ware and utensils of every name and nature and also all personal property now situated and being in said hotel except the personal property reserved by J. S. Johnson and Sallie Johnson in an agreement this day entered into with said first parties and to which reference is hereby made, for a description of the goods and chattels reserved.

And the said parties of the second part for themselves, their heirs, executors, administrators and assigns in consideration of the premises hereby agree to purchase said land and personal property and to pay as the purchase money therefor to the said parties of the first part, their executors, administrators or assigns, the sum of thirteen thousand four hundred fifty-two dollars and sixty-five cents (\$13,452.65), and all unpaid taxes which have been assessed against said real and personal property since July 12, 1912, and all insurance premiums which have been paid by said first parties since July 12, 1912, said payments to be made as follows:

On or before December first, 1914, said second parties are to pay all unpaid taxes and the premiums paid by said first parties for insurance since July 12, 1912, and are also to pay the costs and interest on the costs of foreclosing a mortgage given by George Benson and wife to said first parties on July 12, 1912. The payment of the above taxes, insurance premiums and foreclosure costs to be the first payment on this contract.

The second payment is to be made on or before November 23, 1915, and is to be in the sum of five hundred dollars (\$500).

And said second parties further agree to pay the sum of five hundred dollars (\$500) on the 23rd day of November of each and every succeeding year until the full purchase price is paid.

And said second parties also agree to pay interest at the rate of six per cent per annum to be paid each and every month on the whole sum from time to time remaining unpaid.

And said parties of the second part have the privilege of paying one hundred dollars (\$100) or more on this contract at any time.

And also that said second parties will well and faithfully in due season pay or cause to be paid all taxes and assessments ordinary and extraordinary for any purpose whatever that shall be taxed or assessed upon said lands and appurtenances and said personal property including the taxes for the year 1914.

Said second parties also agree to pay all bills for gas and electricity used in said hotel.

And also that said second parties shall and will keep the buildings erected and to be erected upon the lands above described and the personal property in the buildings on said lands and the personal property which may in the future be placed in said buildings insured against loss or damage by fire in an amount and by insurers approved by the parties of the first part and assign the policy and certificates thereof to the said parties of the first part.

It is mutually agreed by and between the parties hereto that said parties of the second part shall have possession of said lands, hotel and personal property under this contract on the 23rd day of November, 1914, and that said parties of the second part during the existence of this contract shall not remove from said lands any buildings, improvements or fixtures and shall not remove from said buildings any of the furniture, carpets, pictures, plated ware, beds, mattresses, toweling, linens or any personal property which may be in said hotel or may be put in said hotel.

It is mutually agreed that said parties of the second part shall not sell, assign or transfer this contract nor their right, title and interest in and to the same to any other person or persons, firm or corporation without the written consent thereto of the said parties of the first part having been first obtained and endorsed thereby.

The said parties of the first part hereby covenant and agree to and with said parties of the second part that upon the faithful performance by the said parties of the second part of the covenants as herein expressed on their part to be kept and performed, and upon the payment by said parties of the second part of the principal and interest at the time and in the manner hereinbefore specified the said parties of the first part shall and will, without delay, well and faithfully execute and deliver in person or by attorney duly authorized to said parties of the second part a good and sufficient warranty deed and thereby sell and convey to said parties said lands as above described free and clear of and from all liens and encumbrances except such as may have accrued on said lands subsequent to the date hereof by or through the care or negligence of the said parties of the second part. And it is further agreed by the parties hereto that said parties of the first part

on receiving payment in full of the said principal and interest and of all other sums chargeable in their favor hereon shall and will execute and deliver to the said parties of the second part a Bill of Sale of the personal property now in said hotel, except that which has been reserved by J. S. and Sally Johnson as hereinbefore mentioned, and that the same shall be free and clear from all liens and encumbrances except such as may have accrued thereon subsequent to the date hereof by or through the acts or negligence of said parties.

And it is further mutually covenanted and agreed by and between the parties hereto that if default shall be made by the said parties of the second part in any of the payments of the principal or interest at the times or any of the times hereinbefore specified for the payment thereof and for ten (10) days thereafter or in case said parties of the second part shall fail to keep and perform this contract in any other respect wherein the same is herein required by and on their part to be kept and performed, in any such case said party of the first part shall immediately thereafter have the right to declare this contract void and no longer binding and all payments which shall then have been made hereon or in pursuance hereof to be absolutely and forever forfeited to said parties of the first part in the said land with the buildings and improvements thereon and the personal property now in said hotel or which may be put in said hotel shall revert to said parties of the first part and said parties of the first part may consider and treat said parties of the second part as their tenants, holding over without permission and may take immediate possession of the said premises and remove the said parties of the second part therefrom, or at the election of said parties of the first part the covenants herein contained on the part of the said parties of the second part to be kept and performed and the liability of said parties of the second part under this contract shall continue and remain obligatory upon the said parties of the second part and may be enforced and the said consideration money and every part thereof, with interest and any unpaid taxes and insurance premiums as hereinbefore specified may be collected by proper proceedings in law or equity from said parties of the second part and conveyance of said premises be made as aforesaid.

And it is agreed that the stipulations herein contained are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written and have executed this contract in duplicate.

(Signatures.)

(Verification.)

IV. Plaintiffs further show unto the court that they have in all respects carried out their part of the contract and have done and per-

formed all matters and things therein contained by them to be done and performed and have made payments as follows, to-wit:

May 10th, 1915, \$500; March 23rd, 1916, \$500; June 11th, 1917, \$500, which consisted of two items, insurance \$54.54 and check for \$445.46; January 27th, 1918, \$500.

V. That on the 10th day of May, A. D. 1919, F. S. Clafin and Ella M. Clafin conveyed the above described land with the appurtenances to T. Willard Ready of Niles, Michigan, subject however, to the rights of these plaintiffs in the premises.

VI. That on the 28th day of November, A. D. 1919, these plaintiffs offered to pay the said Ready the amount of payments then due, to-wit: five hundred dollars, and tendered the same to him; that he refused to take the same, asserting that he was the owner of said property and these plaintiffs had no rights therein.

VII. That in addition to making the payments aforesaid these plaintiffs paid the interest monthly while the Clafins were the owners of said lands and thereafter paid the interest monthly to the said Ready.

VIII. That on January 26, 1920, these plaintiffs tendered to the said Ready the amount then due on a contract, to-wit, the sum of eleven thousand five hundred twelve dollars and seventy-two cents (\$11,512.72), that therefore these plaintiffs tendered the said Ready Twelve thousand dollars and twelve dollars and seventy-two cents (\$12,012.72), being the said sum of five hundred dollars tendered in November, 1919, and the amount tendered January 26, 1920. That the same was tendered in lawful money of the United States of America, to him, the said Ready, and he was then and there requested to receive the same and receipt therefor.

IX. That on the same day this plaintiff presented to the said Ready a draft of a deed of conveyance of said land in fee simple to this plaintiff and a bill of sale of the personal property and then and there requested the said Ready to execute the same and to deliver the same when executed to these plaintiffs, but so to do the said Ready then and there absolutely refused, although he was then and there well able to convey said personal property, and said lands to these plaintiffs, and although the amount tendered and offered by these plaintiffs to him was ample and sufficient to pay and satisfy the full amount due and owing on said contract, that the said Ready absolutely refused to comply with plaintiffs' request and refused to receive or accept the said money so tendered and offered to him as aforesaid, although making no claim that the same was insufficient in amount and absolutely then and there refused to make conveyance or any conveyance whatsoever and since said time the said Ready has refused and still refuses to accept said money and make the conveyance as aforesaid as in equity and good conscience he should.

X. Plaintiffs further show that in equity they are entitled to have said conveyance made upon payment to the owner of said lands of the amount due on said contract. That the said Ready as they verily

believe purchased said land from the said Claflin with the intent and purpose of depriving these plaintiffs of their rights in said contract because of the fact that property in the City of Niles was rapidly advancing in value and they say that this property to-day is worth \$25,000.

XI. Plaintiffs further show as heretofore set forth that they tendered the full sum due on said contract and they here again offer the same to the defendant and now here advise the court that they are ready and willing to pay the same to the said defendant and that they have now and will hereafter keep the same in readiness to pay the same to said defendant or to such other person or persons as the court shall direct, either now or at any other time up to and including the disposition thereof by this court.

XII. Wherefore, plaintiffs pray:

(1) That the defendant, T. Williard Ready, may without oath, his answer under oath being hereby expressly waived, answer the allegations of this Bill of Complaint.

(2) That the said defendant, T. Williard Ready and Grace M. Ready, his wife, who is made a party defendant to this bill of complaint solely and only because of the fact that she is his wife, may be decreed to specifically perform said contract and to convey to those plaintiffs by a good and sufficient deed title to said land and by a good and sufficient bill of sale, title to the personal property.

(3) That the said defendant, T. Williard Ready, may come to an account with the plaintiffs touching the amount due and owing on said contract. These plaintiffs, as before indicated, being ready and willing and hereby offer to pay the whole amount due on said contract.

(4) That upon such payment the said T. Williard Ready be ordered, directed and decreed by this court to make the conveyance aforesaid.

(5) That upon the making of the payment aforesaid that the plaintiffs be decreed to be the owners of the land described in said contract and the whole thereof in fee simple and of the personal property and of the whole thereof and that the said T. Williard Ready be decreed to be divested of all right, title and interest therein, and that the plaintiffs have leave to cause such decree to be recorded in the office of the Register of Deeds aforesaid.

(6) And that the plaintiffs may have such other and such further relief in the premises as shall be agreeable to equity and good conscience.

(7) And plaintiffs will ever pray.

Edwin J. Donahue, attorney for
plaintiffs, Niles, Michigan.

Thos. J. Cavanaugh, Paw Paw, Mich.,
Of Counsel.

(Verification.)

Francis J. Birney,
Timothy A. Birney.

(c) Answer and Cross-Bill.—(Caption.)

Come now the above named defendants and for answer to plaintiffs' Bill of Complaint say:

I. The defendants admit the first paragraph of plaintiffs' bill of complaint.

II. The defendants admit the second paragraph of plaintiffs' bill of complaint.

III. The defendants admit the third paragraph of plaintiffs' bill of complaint.

IV. The defendants deny the fourth paragraph of plaintiffs' bill of complaint and in answer thereto say that the payments of May 10, 1915, and March 23, 1916, amounting to One Thousand dollars, were made by the plaintiffs but that payments, commencing June 11, 1917, and up to the present time, paid on said contract, were made, if made at all, by the plaintiffs acting for and in behalf of the defendants and that the defendants, T. Williard Ready and Grace Ready, advanced the money to make said payments by reason of their ownership of all of the plaintiffs' interest in the contract set forth in the third paragraph of plaintiffs' bill of complaint, and that the payments of \$500 and \$54.54 and \$445.46 made on June 11, 1917, and the payment of \$500 on Jan. 27, 1918, were in fact the payments of the defendants.

V. The defendants admit that on the 10th day of May, 1919, that F. S. Clafin and Ella M. Clafin conveyed all their right, title and interest in and to said property described in the second paragraph of plaintiffs' bill of complaint, T. Williard Ready, subject to the right of the plaintiffs, if any, and in further answer thereto the defendants say that upon delivery of the said deed from the said F. S. Clafin and Ella M. Clafin to the said T. Williard Ready that thereupon the said T. Williard Ready became the absolute owner of all the property described in said second paragraph of plaintiffs' bill of complaint. That prior to the 10th day of May, 1919, and on or about the 11th day of June, 1917, the plaintiffs for a good and valuable consideration then paid and delivered to them by the defendant, sold, transferred, conveyed and assigned to the defendant, T. Williard Ready, all their right, title and interest of the plaintiffs, Francis J. Birney, and Timothy A. Birney, in and to the land contract, a copy of which is set forth in the third paragraph of plaintiffs' bill of complaint.

VI. The defendants answering the sixth paragraph of plaintiffs' bill of complaint, admit that on the 28th day of November, 1919, the said plaintiffs offered to pay the said Ready \$500 and the defendant, T. Williard Ready, admits that he refused to accept the same and he did then and there assert that he was the owner of the property and that the plaintiffs had no right therein, all of which is true for the reason set forth in the fifth paragraph of this answer, to-wit: that the plaintiffs had prior to that time sold and assigned all of their interest in said premises described in plaintiffs' bill of complaint and in said land contract to the defendant, T. Williard Ready.

VII. The defendant, T. Williard Ready, answering the seventh paragraph of plaintiffs' bill of complaint, denies that the plaintiff had paid any interest to the said T. Williard Ready. He admits that said plaintiffs have sent him a check which was presumably for interest but that the said T. Williard Ready has never accepted any of said checks purporting to be for interest and has never cashed any at any bank and that no interest was due from the said plaintiffs to the said Ready and that the said defendant, Ready, has so notified the said plaintiffs and he stands ready and willing to deliver to the said plaintiffs all of said checks heretofore mailed to the said Ready.

VIII. Answering the eighth paragraph of plaintiffs' bill of complaint the defendant, T. Williard Ready, says that he admits that on the 26th day of January, 1920, the said plaintiffs tendered to him the sum of \$11,512.72 which, together with the \$500 before that time tendered amounted to \$12,012.72. The defendant, T. Williard Ready, says in answer thereto that he refused to accept the said sum so tendered for the reason that at the time of the said tender and at no time since said tender was made have the said plaintiffs owed the said defendant any sum of money, except such a sum of money as they owe for the rent and uses of the premises described in said plaintiffs' bill of complaint since the time they had been in possession and after the conveyance of their interest to the defendant, T. Williard Ready, as is herein more particularly set forth.

IX. The defendant, T. Williard Ready, admits that on the 26th day of January, 1920, the said plaintiffs demanded a conveyance of the said premises together with a conveyance of the personal property as set forth in the ninth paragraph of plaintiffs' bill of complaint. The defendant says that he refused to make conveyance as requested for the reason that he was under no obligation so to do; for the further reason that he was the absolute owner of all the property described in the second paragraph of plaintiffs' bill of complaint, excepting only a mortgage held thereon by Newman & Snell's State Bank, which mortgage is of record and which was executed by these defendants T. Williard Ready, and Grace Ready. That prior to the time of said demand the plaintiffs had conveyed by good and sufficient instrument of conveyance all their right, title and interest in the said premises, to the defendant, T. Williard Ready, and at the time of the said tender, and of the demand for said deed and bill of sale the said plaintiffs had no right, title and interest in and to said property and were therefore not entitled to the conveyance as demanded.

X. The defendant, T. Williard Ready, denies each and every part of the tenth paragraph of plaintiffs' bill of complaint and in further answer thereto says at the time of the purchase of Claffin's interest in said premises by the defendant, T. Williard Ready, on the 10th day of May, 1919, that the defendant, T. Williard Ready, was the owner of all the interest at any time prior to that time owned by the plaintiffs and that the defendant, T. Williard Ready, purchased said premises

in order to acquire all of the title to said premises and that upon the delivery of the deed from the said Clafins to the said T. Williard Ready he thereupon became the owner of the said premises, free and clear of all liens and encumbrances and free and clear from any claim of the plaintiffs. Defendant admits that the property described in plaintiffs' bill of complaint is worth twenty-five thousand dollars and in answer hereto he says that he purchased said property from the said plaintiff upon a valuation of Fifteen thousand dollars and that he paid to the plaintiffs the difference between the amount they then owed to F. S. Clafin and Ella Clafin on the 10th day of June, 1917, in the sum of Fifteen thousand two hundred dollars, which sum amounted approximately to thirty-five hundred dollars, and that upon the said payment of thirty-five hundred dollars by the said Ready to the said plaintiffs they executed an assignment in writing to the defendant, T. Williard Ready, of all his interest in said premises, but that the said plaintiffs have been informed and understand that the defendant, T. Williard Ready, has lost his copy of the assignment of the said contract set forth in the third paragraph of plaintiffs' bill of complaint, which assignment was signed by both of the plaintiffs and that the said plaintiffs knowing that property had advanced in value from fifteen thousand to twenty-five thousand dollars have intentionally and for the purpose of deceiving and defrauding the defendant of his right in said property, knowingly and intentionally misrepresent the facts as to the assignment so made by them as aforesaid, seeking thereby to cheat and defraud the defendant out of his rights.

XI. Answering the plaintiffs' eleventh paragraph of their bill of complaint, the defendants say they neither deny nor admit the facts set forth therein, except this, that there is no sum due the defendants and therefore the defendants say that the bill of complaint of said plaintiffs should be dismissed with the defendants' costs to be taxed.

Cross Bill.—

(1) That on or about the 10th day of May, 1919, he, said defendant T. Williard Ready, purchased of and from F. S. Clafin and Ella M. Clafin, situated in the City of Niles, Berrien County, Michigan, and described as:

Lot twenty-five (25) of East Lacey's Addition to the City of Niles and Lot twenty-four (24) except the east two (2) feet thereof, E. Lacey's Addition to the City of Niles, according to the recorder's plat thereof, with the privileges and appurtenances thereunto belonging, also the following personal property: all the furniture, carpets, pictures and frames, plated ware, utensils of every name and nature and all personal property then situated in said hotel, except certain personal property reserved by J. S. Johnson and Sallie Johnson and that upon his purchase of said property he received and had delivered to him by the said F. S. Clafin and Ella M. Clafin a warranty deed of said property, which deed is recorded in the office of the register of deeds for Berrien County, Michigan, to which record defendant refers for greater certainty and offers to

prove when requested, and that the defendant, T. Williard Ready, thereupon became the owner of said property, subject only to the interest of Francis J. Birney and Timothy A. Birney under a certain contract, dated the 23rd day of November, 1914, a copy of which contract is set forth in the third paragraph of the plaintiffs' bill of complaint and to which the defendant refers. That on the 10th day of May, 1919, the plaintiffs, Francis J. Birney and Timothy A. Birney, had no interest in said contract, having prior to that time sold and conveyed all of their respective interests therein unto the said T. Williard Ready.

(2) Defendant, T. Williard Ready, further says that during the months of May and June, 1917, there was a concerted action in the City of Niles toward the building of a new hotel, and the demands for a new hotel became great and insistent. That the hotel as conducted by the plaintiffs, who were then in possession of the property described herein and referred to in the plaintiffs' bill of complaint, were conducting a hotel, and said hotel as conducted by the plaintiffs was not sufficient for the needs of the City of Niles and the public, and the said property, as conducted by the plaintiff, depreciated in value, and it was represented to the defendant, T. Williard Ready, by the plaintiffs, that they were about to lose their interest in the hotel property because they were unable to make the hotel pay financially. That, thereafter, and thereupon, on, to-wit the 7th day of June, 1917, the defendant, T. Williard Ready, went to the hotel building on the premises hereinbefore described and occupied by the plaintiffs and asked what they were going to do to better the hotel conditions in Niles. That the plaintiffs thereupon replied to the defendant that they would sell out their interest if they got their price. That thereupon plaintiffs agreed to sell the property hereinbefore described and referred to in the second paragraph of plaintiff's bill of complaint and the defendant agreed to purchase the said property and it was thereupon agreed that the purchase price of said property would be and was fifteen thousand two hundred dollars (\$15,200), and out of the said \$15,200 the interest and equity of F. S. Clafin and Ella C. Clafin under the contract hereinbefore referred to was to be paid. That said equity at said time amounted to approximately twelve thousand dollars (\$12,000) and that said equity was payable at the rate of \$500 per year and interest; that the balance or difference between the equity of the said Clafins and the said sum of Fifteen thousand two hundred dollars (\$15,200) was to be paid in cash by the said defendant, T. Williard Ready, to the said plaintiffs and thereupon the plaintiffs were to assign and did assign all of their right, title and interest in the said contract hereinbefore referred to, to the said defendant, T. Williard Ready. That after the said agreement had been so entered into by the parties, the plaintiffs upon the one part and T. Williard Ready upon the other part, the said agreement was reduced to writing and one copy thereof was retained by the plaintiffs and deposited in the safe at the hotel building on the premises above described and one copy thereof was delivered to the defendant T. Wil-

liard Ready. That said copy was signed by the plaintiffs and by the defendant, T. Williard Ready.

That in said agreement so signed by the plaintiffs and by the defendant, T. Williard Ready, the said plaintiffs agreed to sell and the defendant agreed to buy the premises above described and particularly referred to in plaintiffs' bill of complaint, and the plaintiffs did therein sell, assign, transfer and convey by proper words of assignment and conveyance all of their right, title and interest in and to the said premises and in and to the contract set forth and referred to in the third paragraph of plaintiffs' bill of complaint and did herein and thereby agree that they would accept and did accept the sum of Fifteen thousand two hundred dollars (\$15,200) for said interest, and out of such sum they would pay, satisfy, discharge the interest of the said F. S. Clafin and Ella M. Clafin in said contract, and thereupon the defendant, T. Williard Ready, agreed to pay and the said plaintiffs agreed to accept as a payment upon said contract the sum of Fifteen thousand two hundred dollars (\$15,200) for their interest and the interest of the said Clafins and afterwards and on the 23rd day of January, 1918, the defendant, T. Williard Ready, paid the plaintiff Five hundred dollars (\$500) and thereafter and on the 20th day of November, 1918, the defendant, T. Williard Ready, paid the plaintiffs to apply on said contract the sum of One Thousand Dollars and on divers times between the third day of June, 1917, and the first day of January, 1919, the defendant, T. Williard Ready, paid to the plaintiffs several sums of money paying and satisfying all the interest of the plaintiffs in and to said property and in to said contract, in all making a total of \$4,125.31 paid by the defendant, T. Williard Ready, to the plaintiffs. That the defendant, T. Williard Ready, paid to F. S. Clafin and Ella M. Clafin \$11,074.69, which, together with the amount paid the plaintiffs, equals the sum of \$15,200, the purchase price agreed upon. That immediately following the entering into of said written agreement by the said plaintiffs and the said defendant a request was made upon F. S. Clafin and Ella M. Clafin that they consent to the assignment of the contract from the said plaintiffs to the said defendant. That the said F. S. Clafin refused to consent to the said agreement in writing when requested; but that afterwards and by his conveyance of his interest and all of the interest of said F. S. Clafin and Ella M. Clafin to the said defendant, the consent to the said assignment from the plaintiffs to the defendant, T. Williard Ready, became and was unnecessary and the said deed constituted a consent in writing upon the part of the said F. S. Clafin and Ella M. Clafin. Defendant further shows that since the making, executing and delivering of the said contract so signed and executed between the defendant, T. Williard Ready, and the said plaintiffs assigning to the said defendant and conveying to him all of the interest of the said plaintiffs in said property he, the said defendant, has lost the said contract and although he has made diligent search among his papers and effects he has been unable to find the

said contract and he has requested the said plaintiffs to produce their contract, and he does hereby request and demand that the plaintiffs produce said contract existing between them and that when produced the said contract be made a part of this cross-bill and in the event that said contract is not produced that parol testimony be received as to the contents.

(3) The defendant, T. Williard Ready, further shows that immediately after the entering into of said contract wherein the defendant purchased plaintiffs' interest, that an oral understanding and agreement was entered into between the defendant, T. Williard Ready, and the plaintiffs whereby the plaintiffs were to operate the said hotel for and on behalf of the said defendant. That all the receipts of the hotel after the payment of incidental and running expenses were to be used in the repair and upkeep of said hotel and the payment of the taxes and insurance thereon, and under the said agreement the plaintiffs have since said 6th day of June, 1917, operated the said hotel, received all the profits therefrom, paid the repairs, taxes and insurance thereon in accordance with the said agreement with the said defendant, T. Williard Ready. That on divers times and occasions, the said expenses exceeded the receipts of the said hotel and the said defendant, T. Williard Ready, was required to advance the necessary sums for repairs and that he did expend for repairs on said hotel, upwards of Two Thousand Dollars (\$2,000), all with the knowledge and consent of the plaintiffs and acting under the said agreement so entered into as aforesaid. That the said property has since said date greatly increased in value and is now of the value of \$25,000 or more. That the defendant intends to build a hotel thereon and construct a new building upon the real estate therein described; that during the last eighteen months the hotel business has been exceedingly profitable and the said plaintiffs have received large sums of money over and above the running expenses of said hotel, which sums they have refused to account for to the said defendant and that the defendant is informed and believes that upon an accounting of the receipts and expenditures of said hotel the said plaintiffs will owe and do now owe the defendant the sum of five thousand dollars, for which sums they should be required to account and pay. That the plaintiffs are in the employ of the defendant and are not tenants under him. That the defendant has repeatedly requested and demanded that possession of the said hotel be given to him and that an accounting be had by the plaintiffs for their receipts and expenditures while acting for and on behalf of the defendant. That the defendant is now entitled to the possession of said hotel and the plaintiffs have no right, title or interest therein.

Therefore, the defendant prays:

(1) That the plaintiff be required to answer this cross-bill, paragraph by paragraph, but not under oath, and that the plaintiff show cause, if any thereby, why the defendant should not have the relief prayed for in said defendants' cross-bill.

(2) That the defendant, T. Williard Ready, be declared and decreed by this court to be the sole owner of all of the real estate and personal property herein described as (description of property) subject only to a mortgage held thereon by Newman & Snell's State Bank.

(3) That the defendants, Francis J. Birney and Timothy A. Birney, be declared by this court to have sold, transferred and conveyed to T. Williard Ready by a good and sufficient conveyance all their right, title and interest in and to the said property and that they, the plaintiffs, had no right, title or interest therein.

(4) That the defendant, T. Williard Ready, be decreed to be the sole owner of the property hereinbefore described and entitled to the possession thereof

(5) That an accounting be had between the parties hereto and that the plaintiffs be ordered and decreed to account to the defendant for all of the receipts and disbursements made by them since the 7th day of June, 1917, for and on behalf of the defendant in the operation and maintenance of the hotel on said premises and that the defendant have judgment against the plaintiffs for the amount found due to the defendant upon such accounting.

(6) That the plaintiffs be required to quit, surrender and deliver up possession of all the said premises and property by the order and decree of this court.

(7) That the defendant may have such other and further relief in the premises as shall seem just and equitable, the premises being considered.

And the defendant will ever pray.

GLENN E. WARNER,
WILBUR N. BURNS,
PHILLIP A. HADSELL,

Attorneys for Defendant.

(d) Brief for the Plaintiff.—It is the settled doctrine of equity that the form of a transaction will never preclude inquiry into its real nature, but in all cases the intention of the parties must control irrespective of the form, and consequently if a conveyance is made and security for money in whatever form the conveyance is made or whatever cover may be used to disguise the transaction and hide its real character from others it will be treated and held as a mortgage. *Flynn v. Holmes*, 145 Mich. 606; *Darling v. Darling*, 123 Mich. 307; *Crawford v. Osmun*, 70 Mich. 561; *Jones on Mortgages*, paragraph 20; *Cyc.* 27, 991.

In the case of *Crawford v. Osmun*, *Supra*, the plaintiff assigned a land contract to the defendant and later gave him a quit claim deed. Subsequently she filed a Bill of Complaint to redeem on the theory that the transaction amounted to a mortgage. The lower court dismissed the Bill of Complaint but the Supreme Court sustained her contention and granted the relief prayed.

The defendant Ready is asking for the specific performance of a contract to sell which he claims was made on the 7th day of June, 1917

He is not entitled to specific performance of this contract as a matter of right.

In *Solomon v. Shewitz*, 185 Mich. 631, this court said: "However, it has apparently been held that the jurisdiction of a court of equity to decree specific performance of contracts is not a matter of right to be demanded *ex debito justitiae*, but application invoking this power of the court was addressed to its sound and reasonable discretion and are granted or rejected according to the circumstances of the case."

In *Rust v. Conrad*, 47 Mich. 454, this court said: "When a party comes into equity it should be very plain that his claim is an equitable one. If the contract is unequal, if he has bought land at a price which is held inadequate, if he has obtained the assent of the other party to unreasonable provisions, if there are any other indications of over-reaching or unfairness on his part the court will refuse to entertain his case and turn him over to the usual remedies. Specific performance is a matter of grace rather than a matter of right." If the defendant's actions and conduct and promises were such as to induce Birney to surrender a valuable arrangement which they had made or were making with the Citizens Committee, then he does not come into this court with clean hands. The language of Judge Gilbert in *Marks v. Gates*, 154 Fed. 482, would be applicable here: "He who seeks equity must do equity." The doctrine thus applied means that the party asking the aid of the court must stand in conscientious relation toward his adversary; that the transaction from which his claim arises must be fair and just and that the relief itself must not be harsh and oppressive upon the defendant." 25 R. C. L., 224; *Rudisill v. Whitener*, 15 Ln. 81.

(e) Brief for Defendant.—The defendant in his brief takes up the matter of argument, dealing only with the record and does not cite any law which would be of help in this case.

(f) Holding of the Court.—The court held that the evidence sustained the defendant's contention that plaintiffs had sold their equity in the premises in question to the defendant and that the defendant had also purchased all of plaintiffs' vendor's interest in the property and a decree for the defendants upon the cross-bill was entered. The court also held that the several negotiations had between the parties culminated in a written agreement. The presumption is that it contains all that the parties agreed upon.

LYLE v. MUNSON, 213 Mich. 250—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer of Defendant.
- (d) Exhibit "A".
- (e) Intervenor's Bill of Complaint.
- (f) Answer to Intervenor's Bill of Complaint.
- (g) Opinion of the Court.
- (h) Decree of the Court.
- (i) Authorities Cited by Plaintiff—Brief for the Plaintiff.

(j) Authorities Cited by Defendant—Brief for the Defendant.

(a) Brief Statement of Fact.—This was an action brought for specific performance where the plaintiff relied both in his pleadings and proofs, upon a written agreement signed by the parties, and also upon a parol agreement of like tenor preceding it.

The case is of interest for the reason that the acts of part performance relied upon are unusually slight, the court grounding its decision, to a large extent, to the doctrine of equitable estoppel.

(b) Bill of Complaint.—State of Michigan, In the Circuit Court for the County of Saginaw, in Chancery. William Lyle, Plaintiff, v. William C. Munson, Defendant.

To the Circuit Court for the County of Saginaw, In Chancery:

I. William Lyle, as plaintiff herein, respectfully shows to this Honorable Court that he is a resident of the Township of Buena Vista, County of Saginaw, State of Michigan, and

II. That heretofore and some time during the month of February, 1919, that one William C. Munson, a widower, of the Township of Buena Vista, County of Saginaw and State of Michigan, did agree with him orally to let and lease to him for a period of two years with the privilege of purchasing for the sum of three thousand five hundred (\$3,500) dollars, on or before the expiration of said lease, the following described property, situated and being in the Township of Buena Vista, County of Saginaw, State of Michigan, to-wit: Commencing at the south quarter ($\frac{1}{4}$) post of section seventeen (17), thence north ten (10) chains, west four (4) chains, south ten (10) chains and east four (4) chains to the beginning, also east of ($\frac{1}{2}$) of twenty-five and one-half ($25\frac{1}{2}$) acres of land described as follows: Commencing at a point on the north and south quarter ($\frac{1}{4}$) line of section seventeen (17) nine (9) chains, seventy-one (71) links from the south boundary line of said section, thence running north on said quarter ($\frac{1}{4}$) line seventeen (17) chains, ninety (90) links, thence west parallel with the south boundary fourteen (14) chains, twenty-five (25) links to a point, thence south parallel with said quarter ($\frac{1}{4}$) line seventeen (17) chains, ninety (90) links to northwest corner of land formerly owned by Lazette E. Munson, thence east to the beginning.

III. That then and at sundry times thereafter said William C. Munson did promise plaintiff to reduce said agreement to writing and that he did repeatedly confirm said contract orally.

IV. That relying upon said oral agreement with said William C. Munson, your plaintiff did on or about March 10th, 1919, give up the home he was then occupying and remove therefrom and did enter into and take possession of the property shown above described and has been in continuous, open, notorious and undisputed possession thereof from and since March 10th, 1919, until the present time and is now in the possession thereof, and during this time has made various and sundry improvements to the house and to the property and has drawn upon the property a large quantity of lumber for the purpose of constructing a barn.

V. That said William C. Munson on the 7th day of April, 1919, did reduce said oral agreement to writing and did by written instrument, bearing date aforesaid, formally contract to convey to your plaintiff the above described land, a copy of which contract was annexed to the original bill of complaint in this cause and which said written instrument did in pursuance of said oral agreement previously made, contain the following language:

“Provided further that said party of the second part shall, on or before the expiration of this lease have the privilege of buying said above described property for the sum of Three Thousand Five Hundred (\$3,500.00) Dollars.”

VI. That pursuant to the oral agreement as above, as embodied in the written instrument bearing date the 7th day of April, 1919, plaintiff did on the 5th day of June, 1919, notify the said defendant, William C. Munson, that he desired to buy the property described in the agreement for the sum therein mentioned.

VII. That in pursuance of the terms of said agreement, and in conformity therewith he did on the 30th day of July, 1919, tender to the said William C. Munson, the sum of three thousand five hundred (\$3,500) dollars lawful money of the United States of America, as the full amount of the purchase price thereunder, and did at the same time tender to the said William C. Munson a warranty deed, a copy of which was annexed to the bill of complaint in this cause, and that at the same time that he so made the tender of said lawful money as aforesaid and of said deed, he requested the said William C. Munson to then and there execute the said deed and convey the said property to the said plaintiff, and the said William C. Munson did then and there refuse without cause or reason to execute said deed and accept the said money so tendered to him as aforesaid, and that the plaintiff has always been and still is ready, willing, and able, and now offers fully and specifically to perform the said agreement on his part and pay the said sum of three thousand five hundred dollars on receiving a deed properly executed by the said defendant, William C. Munson, running to him, the said plaintiff, William Lyle, of the premises, and

VIII. That relying on said agreement as above your plaintiff did on, to-wit, the 20th day of June, 1919, enter into a written contract with one James C. Harris whereby he contracted to sell to said Harris a portion of the land included in said agreement with said William C. Munson, and did obligate himself for the delivery thereof and that said James C. Harris has since called upon him to perform his part of the contract, and your plaintiff is unable to do so because of the failure of said William C. Munson to deliver a deed to the property in conformance with the agreement previously had with him by your plaintiff.

IX. That your plaintiff in such tender and offer, and at divers other times has requested the said William C. Munson to perform his part of the said agreement and convey to your plaintiff all those certain pieces or parcels of land situated and being in the Township of Buena Vista,

County of Saginaw, State of Michigan, known and described as follows: Commencing at the south quarter ($\frac{1}{4}$) post of section seventeen (17), thence north ten (10) chains, west four (4) chains, south ten (10) chains, and east four (4) chains to the beginning, also east half ($\frac{1}{2}$) of twenty-five and one-half ($25\frac{1}{2}$) acres of land described as follows: Commencing at a point on the north and south quarter ($\frac{1}{4}$) line of section seventeen (17), nine (9) chains, seventy-one (71) links from the south boundary line of said section, thence running north on said quarter ($\frac{1}{4}$) line seventeen (17) chains, ninety (90) links, thence west parallel with the south boundary fourteen (14) chains, twenty-five (25) links to a point, thence south parallel with said quarter ($\frac{1}{4}$) line seventeen (17) chains, ninety (90) links to northwest corner of land formerly owned by Lazette E. Munson, thence east to the beginning, in pursuance to said agreement, but the said William C. Munson, although well able to perform his part of said agreement to convey the premises heretofore described to the said plaintiff has refused and still refuses on divers frivolous pretexts so to do, and does still refuse to execute said deed in compliance with the agreement heretofore set forth.

X. That said plaintiff has fully performed on his part every part of the said agreement and has called upon defendant to perform on his part.

XI. Said plaintiff further avers that the said defendant, William C. Munson, is negotiating for the sale of the whole or divers parts of said property and threatening to sell, assign, mortgage, encumber, convey, transfer and dispose of the whole or divers parts of said property, and that the said defendant, William C. Munson, ought to be restrained from selling, assigning, mortgaging, encumbering, conveying, transferring or disposing of said property contrary to the terms of said agreement as made and entered into as aforesaid.

XII. Said plaintiff further shows that there are no lands in the vicinity of the lands hereinbefore described which can be purchased by said plaintiff which are of like kind, quality, and condition and suitable to the uses and purposes of said plaintiff and that he will suffer irreparable injury and damage unless the said defendant shall be compelled to perform the said contract and convey the said lands to the said plaintiff in accordance therewith, and unless the said defendant shall be restrained from selling, assigning, mortgaging, encumbering conveying, transferring, or disposing of said property contrary to the terms of the said agreement as made and entered into with said plaintiff as aforesaid.

XIII. For as much therefore as the plaintiff is without remedy in the premises except in a court of equity, he asks the aid of this court to the end,

1. That the said William C. Munson who is made a party defendant to this bill of complaint, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived.

2. That the court may decree that the said agreement may be specially performed and that the said defendant, William C. Munson, may be de-

creed to specifically perform the said agreement on his part and to execute to the said plaintiff a deed of conveyance of the following described property situated in the Township of Buena Vista, County of Saginaw, State of Michigan, to-wit: Commencing at the south quarter ($\frac{1}{4}$) post of section seventeen (17), thence north ten (10) chains, west four (4) chains, south ten (10) chains, and east four (4) chains to the beginning, also east half of twenty-five and one-half ($25\frac{1}{2}$) acres of land described as follows: Commencing at a point on the north and south quarter ($\frac{1}{4}$) line of section seventeen (17), nine (9) chains, seventy-one (71) links from the south boundary line of said section, thence running north on said quarter ($\frac{1}{4}$) line seventeen (17) chains, ninety (90) links, thence west parallel with the south boundary fourteen (14) chains, twenty-five (25) links to a point, thence south parallel with said quarter ($\frac{1}{4}$) line seventeen (17) chains, ninety (90) links to northwest corner of land formerly owned by Lazette E. Munson, thence east to the beginning, in due form of law, said plaintiff being ready and willing, and hereby offering to perform the said contract fully and specifically on his part.

3. That the said defendant, William C. Munson, may be restrained by the temporary injunction of this court from selling, assigning, mortgaging encumbering, conveying, transferring or disposing of in any manner the said real estate as hereinbefore described until a final hearing may be had herein, or until the further order of this court.

4. That the said injunction may be made permanent against the said William C. Munson.

5. That said Plaintiff may have such further or different relief as shall be agreeable to equity and to this court shall seem meet, and said plaintiff will ever pray, etc.

WILLIAM LYLE.

COOK & COOK,

Attorneys for plaintiff.

Business address:

204-56 Eddy Building,

Saginaw, Michigan.

(c) Answer of Defendant.—(Caption.) This defendant reserving to himself all rights of exception to said amended bill of complaint for answer thereto, says:

Defendant admits the statements made in paragraphs 1, 2 and 3, except that he denies that he made any oral agreement with said plaintiff to sell to said plaintiff said land or to give him the privilege of purchasing the same, or that he ever promised him, orally, to reduce such agreement to writing.

II. In answer to paragraph 4, defendant says that the only possession had by said plaintiff to said land was that of a tenant, that he did not make any improvements of value to anyone except himself, as a tenant on said land, but on the contrary he agreed to make said improvements, and many more which he has failed to make for the use of said land.

III. In answer to paragraph 5, this defendant reiterates paragraph "A" in Subdivision 8 of his answer to the original bill of complaint, and further says that he denies that he ever intended to have incorporated in said lease, made and executed on Sunday, as in said answer stated, the language as quoted in said paragraph 5; that said lease was prepared by his son-in-law, James McDonald, and that when this defendant signed said lease, he supposed that the language used was as he had understood the talk had in reference to this privilege of purchasing said land, which was to the effect that after the two (2) years had expired for which said premises were leased, that if said plaintiff wanted to purchase said property, at that time, he would be willing to sell it to him for the sum named. That he did not read said lease; did not know the language used until it was called to his attention at the time said plaintiff talked with him in relation to the selling of said land to Henry J. Dieckmann, as stated in Subdivision "C" in said paragraph 8 of his said answer in said original bill of complaint.

IV. In answer to the remaining paragraphs of said amended bill of complaint, this defendant says that the allegations therein contained are the same as set forth in said original bill of complaint, and that his answer thereto is the same as stated in his answer to said original bill of complaint, and that he reiterates such answer in full, the same as though he had reincorporated the same in this answer.

V. This defendant further answering said amended bill of complaint, denies all and every allegation therein contained not herein answered, as aforesaid and denies that said plaintiff is entitled to the relief or any part thereof in said amended bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded, or demurred to the said amended bill of complaint, and prays that the same be dismissed with his reasonable cost and charges in this behalf sustained.

WILLIAM C. MUNSON,

Defendant,

By W. J. LAMSON,

Attorney for Defendants.

(d) Exhibit "A".—It Is Hereby Agreed, Between William C. Munson, party of the first part, and William Lyle, party of the second part, as follows: The said party of the first part, in consideration of the rents and covenants herein specified, does hereby let and lease to the said party of the second part, the following described premises, situated and being in the Township of Buena Vista, County of Saginaw and State of Michigan, to-wit: Commencing at the south quarter ($\frac{1}{4}$) of section seventeen (17), thence north ten (10) chains, west four (4) chains, south ten chains and east four (4) chains to the beginning; also east half ($\frac{1}{2}$) of twenty-five and one-half acres of land described as follows: Commencing at a point on the north and south quarter ($\frac{1}{4}$) line of section seventeen (17), nine (9) chains seventy-one (71) links from the south boundary line of said section thence running north on said quarter ($\frac{1}{4}$) line seventeen (17) chains ninety (90) links, thence west parallel with the south bound-

ary fourteen (14) chains twenty-five links to a point, thence south parallel with said quarter (¼) line seventeen (17) chains 90 links to northwest corner of land formerly owned by Lazette E. Munson, thence east to the beginning, for the term of two years from and after the 1st day of March, 1919, on the terms and conditions hereinafter mentioned, to be occupied for farming.

Provided, That in case any rent shall be due or unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, certain attorney, heir representatives and assigns, to re-enter into, repossess the said premises, and the said party of the second part and each and every other occupant, to remove and put out.

And the said party of the second part does hereby hire the said premises for the term of two years as above mentioned, and does covenant and promise to pay to the said party of the first part, his representatives and assigns, for rent of said premises for said term the sum of Three hundred dollars per year, payable as follows: One hundred and fifty dollars on the 1st day of August, 1919, and one hundred and fifty dollars every six months thereafter until the whole of six hundred (\$600.00) is paid.

Provided further that said party of the second part shall, on or before the expiration of this lease have the privilege of buying said above described property for the sum of three thousand five hundred dollars (\$3500.00).

Said party of the second part further covenants that he will not assign nor transfer this lease, or sub-let said premises, or any part thereof, without the written assent of said party of the first part.

And also, that said party of the second part will at his own expense, during the continuance of this lease keep the said premises and every part thereof in as good repair, and at the expiration of the term, yield and deliver up the same in like condition as when taken, reasonable use, and wear thereof and damage by the elements excepted.

And the said party of the first part does covenant that the said party of the second part, on paying the aforesaid installments and performing all the covenants aforesaid, shall and may peacefully and quietly have, hold, and enjoy the said demised premises for the terms aforesaid.

The covenants, conditions and agreements made and entered into by the several parties hereto, are declared binding on their respective heirs, representatives and assigns.

Witness: Our hands and seals this 7th day of April, 1919.

W. C. MUNSON, L. S.

WILLIAM LYLE, L. S.

Signed, sealed and delivered in presence of

JAMES E. McDONALD.

(e) Intervenor's Bill of Complaint.—(Caption). James C. Harris, John Y. Wickes and William J. Wickes, Jr., as intervenors in the above entitled cause, respectfully show:

1. That William C. Munson did by written instrument dated the 7th day of April, A. D. 1919, contract to convey to one William Lyle, certain land situated in the Township of Buena Vista, County of Saginaw, and State of Michigan, a copy of which contract was annexed to the bill of complaint of William Lyle, plaintiff in the above entitled cause, reference to which is hereby made.

2. That said intervenors are informed and believe and therefore charge the fact to be that the said William Lyle entered into possession of said premises on, to-wit: March 1st, 1919, by and under an oral agreement with said William C. Munson and which said oral agreement was thereafter reduced to writing as hereinbefore set forth. That said William Lyle by and under said agreements aforesaid has been in the continuous, open, notorious and undisputed possession of said premises from and since the said, to-wit, March 1st, 1919, until the present time and is now in possession thereof.

3. That said intervenors entered into an agreement among themselves for the purchase of a portion of the property covered by said contract of April 7th, A. D. 1919.

4. That in conformance with said agreement and relying upon the contract made and executed the 7th day of April, A. D. 1919, between the said William C. Munson and the said William Lyle, and upon the continuous and undisputed possession of said William Lyle as aforesaid, said intervenor, James C. Harris, did on, to-wit, the 20th day of June, A. D. 1919, enter into a written contract with the said William Lyle for the purchase of a portion of the land covered by said contract of April 7th, A. D. 1919, a copy of which written contract between the said William Lyle and the said James C. Harris is hereto annexed, and made a part hereof.

5. That in conformance with the previous agreement between them said intervenor, James C. Harris, did on, to-wit, the 21st day of June, A. D. 1919, enter into a written contract with the said John Y. Wickes and William J. Wickes, Jr., whereby he did assign and grant to each an undivided one-third interest in and to the aforesaid contract with the said William Lyle, a copy of which is hereto annexed and made a part hereof and reference to which is herewith made.

6. That said intervenors are informed and believe and therefore charge the fact to be that on, to-wit, the 5th day of June, A. D. 1919, the said William Lyle did notify the said William C. Munson that he desired to buy the above described property in conformance with the contract between them dated April 7th, A. D. 1919.

7. That said intervenors are further informed and believe and therefore charge the fact to be that the said William Lyle did on, to-wit, the 30th day of July, A. D. 1919, tender to the said William C. Munson the sum of thirty-five hundred (\$3500.00) dollars, lawful money of the United States of America, as the full amount of the purchase price according to said contract of April 7th, A. D. 1919, and did at the same time tender to the said William C. Munson, a warranty deed, a copy of which is

annexed to the bill of complaint of said William Lyle, plaintiff in the above entitled cause and reference to which is herewith made, and did request the said William C. Munson then and there to execute the said deed and convey the said property to the said William Lyle and that the said William C. Munson did then and there refuse, without cause or reason, to execute the said deed or to accept the money so tendered to him as aforesaid and that the said William Lyle has always been and still is ready, willing, and able to perform the said agreement on his part, and pay the sum of thirty-five hundred (\$3500.00) dollars on receipt of a deed properly executed by the said William C. Munson to him of the said premises.

8. That said intervenors are informed and believe and therefore charge the fact to be that the said William Lyle has repeatedly and at divers times requested the said William Munson to perform his part of the said agreement of April 7th, A. D. 1919, and to convey to him the land therein described, and that the said William C. Munson, although well able to perform his part of the agreement of April 7th, A. D. 1919, has refused and still refuses on divers frivolous pretexts so to do.

9. That because of the proximity to the city of the property described in said contract of April 7th, A. D. 1919, by and between the said William C. Munson and the said William Lyle and because of the platting into lots of property in its immediate vicinity, and because of much proposed building nearby, some of which has already been started, and because also of the great and increasing demand for lots there, the value of the said property has greatly increased and it is worth today far in excess of thirty-five hundred (\$3500.00) dollars.

10. That the value of said property has been and is now rapidly increasing and promises to continue to do so and there is no other property similarly situated that can be secured by said intervenors.

11. That said intervenors have contracted in good faith under and relying upon the said contract of April 7th, A. D. 1919, by and between the said William C. Munson and the said William Lyle, with no knowledge or notice whatever of any possible defects therein and also relying upon the undisputed possession of the said William Lyle in conformance with the said contract dated April 7th, A. D. 1919.

12. That on, to-wit, the 20th day of June, A. D. 1919, at the time the written contract, copy of which is hereto annexed and which is herewith incorporated as a part of the bill of complaint, was executed by and between the said William Lyle and the said James C. Harris, said intervenor James C. Harris did inform him that he was prepared and ready and anxious to pay over the money and take a deed to the property immediately and at any time said William Lyle was able to convey the said property.

13. That repeatedly and at sundry times since then the said intervenor, James C. Harris, has informed the said William Lyle that he was ready at all times to pay over the purchase price of the property described in said contract dated the 20th day of June, 1919, by and between the

said William Lyle and the said James C. Harris, and has made offer so to pay upon delivery to him of a sufficient deed conveying the title to the said property to said James C. Harris or to all of said intervenors

14. That on, to-wit, the 16th day of August, A. D. 1919, the said James C. Harris by Louis Smith, his agent, did notify said William Lyle in writing that he was prepared to purchase the property, that the money would be paid over immediately upon the execution to him of a sufficient deed conveying the title and that he called upon said William Lyle to perform according to the terms of said contract of June 20, A. D. 1919.

15. That said James C. Harris, John Y. Wickes and William J. Wickes, Jr., have at all times held themselves in readiness to pay over the purchase price immediately upon delivery to them or to any of them of a sufficient deed conveying the title to said property and that they still hold themselves so in readiness and herewith make formal offer of payment, but the said William Lyle has been prevented from performing his part of said contract of June 20th, A. D. 1919, by the failure and refusal of said defendant, William C. Munson, to convey the property to him in conformance with the contract dated April 7th, A. D. 1919, by and between the said William C. Munson and the said William Lyle.

16. That said intervenors therefore have such an interest in the above entitled cause that the failure to enforce the above mentioned contract of April 7th, A. D. 1919, between the said William C. Munson and the said William Lyle, would result in great wrong and in grievous and irreparable injury to them.

Wherefore your intervenors pray:

1. That the said William C. Munson and the said William Lyle, defendants hereto, may without oath, answer upon oath being hereby waived, full, true and perfect answer make, to the matters made and stated in this bill of complaint.

2. That the said contract dated April 7th, A. D. 1919, between the said William Lyle and the said William C. Munson may be decreed to be a valid and binding obligation upon said William C. Munson by this court and that the said William C. Munson may be decreed specifically to perform the said contract, and make a good and sufficient conveyance of the title of said lands to the said William Lyle.

3. That the said William Lyle be decreed specifically to perform the said contract with the said James C. Harris of June 20, A. D. 1919, and

4. That said intervenors may have such other or further relief in the premises as shall be agreeable to equity and good conscience and your intervenors will ever pray.

JAMES C. HARRIS,

JOHN Y. WICKES,

WILLIAM J. WICKES, JR.

(Verification.)

(f) Answer to Intervenor's Bill of Complaint.—(Caption.) This defendant reserving to himself all right of exceptions to the said intervenors' bill of complaint for answer thereto, says:

1. In answer to paragraphs one and two, he denied the allegations therein contained, except in this, that he admits that he had rented to said plaintiff the premises mentioned in said bill in January, 1919.

2. As to the allegations contained in paragraphs three, four and five of said bill, this defendant avers that he is a stranger, and can neither admit nor deny the same; that it is immaterial to said action, and therefore neither admits nor denies the same.

3. In answer to paragraph six, said defendant admits that said William Lyle informed him some time prior to the commencement of said action that he desired to purchase said property, the exact date he is unable to give.

4. In answer to paragraphs seven and eight, defendant admits that said plaintiff tendered to him certain money, the amount of which he does not know, and that he requested deed of the property mentioned in said bill; that he refused to accept said money or to execute said deed.

5. Defendant admits the statements in paragraphs nine and ten. In answer to paragraph eleven of said bill, defendant denies that said intervenors arranged to purchase said property from said Lyle in good faith, or that they took the required or proper precaution to inform themselves of the contract relation existing between this defendant and said plaintiff. In answer to paragraphs twelve, thirteen, fourteen and fifteen, this defendant says he has no knowledge sufficient to form a belief, and therefore neither admits nor denies the same.

6. This defendant further answering said bill says, that he has never had any contract relation whatever with said intervenors or either of them; that as to any deal that they may have had with said William Lyle, he is a stranger and in no manner or form liable or responsible for; that while he believed that some persons, to this defendant unknown, were attempting to purchase said real estate of him through said Lyle, he did not know who they were until he received said bill of complaint.

7. Defendant says, that in January, 1919, he orally rented to said Lyle the property described in said bill of complaint, and that on Sunday, the 6th day of April, 1919, he executed with said Lyle the lease, a copy of which is attached to said bill of complaint of said Lyle in said cause, and marked Exhibit "A"; that said lease was dated the 7th day of April, 1919, because said 6th day of April was Sunday; that said lease so made and executed on Sunday has never been changed or ratified by this defendant on any secular day.

8. This defendant further answering, denies that said intervenors have in good faith become interested in the transaction between said plaintiff and this defendant, and they are not good faith contractors for the purchase of said real estate, and he denies that they or either of them are entitled to the relief or any part thereof in their said bill of complaint demanded, and prays the same advantage of this answer as if he

had pleaded or demurred to the said bill of complaint, and prays that the same be dismissed with his reasonable cost and charges in his behalf sustained.

W. J. LAMSON,
Attorney for Defendant,
B. J. VINCENT,
Counsel for Defendant.

WM. C. MUNSON,
Defendant,
By W. J. LAMSON,
His Attorney.

(g) Opinion of the Court.—(Caption.) The Court: This is a case brought on the chancery side of the court, by William Lyle, against William C. Munson, asking for the specific performance of a contract which the plaintiff claims to have been made with the defendant, with reference to the rental and the purchase of a piece of land consisting of about twenty acres, in the Township of Buena Vista, in this county.

It is the claim of Mr. Lyle, the plaintiff, that he first had oral negotiations with Mr. Munson, the defendant, with reference to the renting of this land, and the purchase of the same, and that as a result of those negotiations an oral agreement was made to the effect that Mr. Lyle was to be permitted to go upon the premises and have the same as the tenant of Mr. Munson, for the period of two years, for which he was to pay him a semi-annual rental of one hundred and fifty dollars. He was also, any time during the period of the lease, to have an option to purchase this land for the sum of thirty-five hundred dollars.

This claim is disputed by the defendant in the case. He admits having talks with the defendant with reference to the renting of the place, but he denies that he, at any time, orally agreed with him that he was to have the privilege at any time during the period of two years, which was to be the rental period, to purchase the land for the sum of thirty-five hundred dollars. He claims the mention of the purchase was made at the sum of thirty-five hundred dollars, but that this had reference to the purchase of the place at the expiration of the period for two years, and if at the end of the lease, of two years, it was the desire of Mr. Lyle to purchase the place for thirty-five hundred dollars, that he had the right to do so, and that he would deed it to him.

That is the first question of fact that becomes necessary for the court to determine. This being a chancery case, it is necessary for the court, unfortunately, to determine the question of fact in the case as well as the questions of law.

I can appreciate the fact that it is not always a pleasant duty for a jury to determine those things, and it is particularly so for the court in a case of this kind.

It is the further claim of the plaintiff in the case that he insisted that this oral agreement be reduced to writing, and to that end called upon Mr. Munson several times, and asked him to do so. Mr. Munson put him off from time to time, because Mr. McDonald, his son-in-law, who was to draw the lease, was busy and was not in a position to attend to the matter at that time. But the plaintiff claims that finally, on the seventh day of April, 1919, being Monday, he went to the home of Mr.

McDonald, where the defendant Mr. Munson lived, and Mr. McDonald did draw up the lease and that the same was signed and executed by both of the parties, and the lease is produced here in court, has been offered and received in evidence, and has been known throughout the trial as Exhibit "A". This lease, among other things, which are the usual covenants and agreements in lease, provides: "Provided further that the said party of the second part shall, on or before the expiration of this lease, have the privilege of buying said above described property for the sum of three thousand five hundred dollars."

The defendant denies that this lease was executed on the 7th day of April, notwithstanding it was dated on that day, and he claims that it was executed on the 6th day of April, the day preceding, which would be on Sunday, and that because of the fact it was executed on Sunday, the lease is absolutely void, that the written lease is absolutely void insofar as affecting the parties.

It becomes the duty of the court to determine as the second question of fact whether or not this lease was executed upon Sunday, as claimed by the defendant, or upon Monday, as claimed by the plaintiff in the case.

The court has no hesitancy in determining, as a matter of fact, in this case, that the lease was executed upon Sunday. The court has had the opportunity of seeing the witnesses upon the stand who testified upon that subject. The great weight of the testimony shows that the contract or the lease was executed on that day. The court has confidence in the testimony of witnesses who have testified to its execution on Sunday; witnesses who are personally known to the court, and in who the court has confidence with respect to their veracity. The court therefore finds that the contract was executed upon Sunday, and so far as the written contract is concerned, is void and of no binding force or effect upon either of the parties in the case.

The other question presented to the court for its consideration is whether or not there has been such a performance of the oral contract to purchase this land as would warrant the court in specifically performing that contract, and to take it out of the statute of frauds, which provides that contracts with reference to the sale of real estate must be in writing.

The court has had the advantage of seeing the witnesses upon the stand with reference to this matter, and has no hesitancy in arriving at the conclusion of fact which it does upon this particular matter.

It is quite apparent to the court that the enhancement of the value of this real estate has considerable to do with the conduct of both parties in the case. In fact it is quite apparent to the court that real estate men are very anxious to have Mr. Lyle put in position so that he can transfer the property to them, and the same situation exists with reference to Mr. Munson. However that may be, this case is not to be determined upon the question of whether or not the real estate has enhanced in value, but as to the rights of the parties, irrespective of

the value of the land, and irrespective of whether or not real estate men are anxious to buy it from whichever party is successful in the case.

The plaintiff contends that there was an oral contract, and that it has substantiated that oral contract by a preponderance of the evidence in the case; that that oral contract has been partly performed, and that that oral contract consisted of an agreement between Mr. Lyle and Mr. Munson whereby Mr. Lyle agreed, or whereby Mr. Munson agreed at any time within a period of two years to sell this property to Mr. Lyle for the sum of thirty-five hundred dollars, and that in addition to that he agreed that he should have the right to remain upon the premises, as his tenant, for the period of two years, at a stipulated rental of three hundred dollars per year.

The court cannot come to the conclusion that the plaintiff in this case has shown such a contract as would entitle it to a specific performance, by the decree of the court. From the testimony of the witnesses, from the opportunity the court has had of seeing the witnesses upon the stand, and observing their conduct and observing the manner in which they gave their testimony, I am now satisfied that the minds of the parties met in such a contract as would be certain and definite to the extent that the court at this time would be warranted in decreeing a specific performance of this particular contract. Mr. Munson testified that he had no agreement with him whereby he was to convey it to him at any time during the two years of his occupancy of the premises. I believe Mr. Munson's testimony, I am satisfied that that was his idea of the situation. If that was not the idea of the plaintiff, the minds of the parties did not seem to meet on any particular contract which permitted the plaintiff at any time during the period of two years to pay thirty-five hundred dollars and that Mr. Munson, the defendant, would deed the place to him.

A contract, to be specifically performed, must be definite, must be certain. The rights of the party who is asking that the contract be specifically performed must have been in some way seriously interfered with. I am not satisfied that this man went into possession of the place with the idea that he was going to purchase it. His apparent idea in entering possession of the place was as a renter. He was a renter in the city. It may have placed him a little closer to his work that he was doing. But his principal motive in going into possession of the place was his idea of occupying the premises as a renter, is the opinion of the court from the evidence in the case.

The court therefore finds that there is no written contract as binding upon the parties. That there was no oral contract made between the parties to warrant the court in granting the relief asked for by the plaintiff, viz., a specific performance, and the defendant will prepare a decree in the case dismissing the bill of complaint filed by the plaintiff with taxable costs to be awarded to the defendant.

Mr. Lamson: May we include in that the interpleader bill that was filed here by Mr. Harris? Mr. Harris has interpleaded; it has been tried out by the same statement of facts here.

The Court: I don't know about that. What about that?

Mr. Lamson: An interpleader bill, where they allege the same things, practically, as the others, only they include the fact that they may be protected by the decree of this court as to the specific performance of the contract. Their rights stand or fall on the main case, as I understand it.

The Court: You mean, Mr. Harris has interpleaded here?

Mr. Lamson: Yes; an interpleader's bill on the part of Mr. Harris, where he interpleads and——

The Court: Who is his attorney?

Mr. Robert H. Cook: I am. Cook & Cook.

The Court: It may all be dismissed, all of them under the decree of the court. The relief is denied.

Mr. Robert Cook: We move the court for the right to have a decree entered in favor of the plaintiffs in this case along the line of Mr. Munson's testimony, which the court found to be correct, viz.: That the payment was to be made at the end of the two years.

The Court: No, I don't think that to be the fact, Mr. Cook.

Mr. Cook: That was stated in the opinion, may it please the court.

The Court: No; I said that was his idea of it. In order to make a contract the minds of the parties must meet. He thought it was to be paid at the end of two years, and the other man didn't. Your request will be denied.

(h) Decree of the Court.—(Caption.) At a session of said court held at the Court House of the City of Saginaw in said county on the 27th day of October, 1919.

Present: Hon. Ernest A. Snow, Circuit Judge.

This cause came on be heard on the 9th day of October, 1919, upon a bill of complaint filed therein by said plaintiff, and upon bill of complaint filed therein by the intervenors, and issue therein being formed by answers of said defendant, and proofs having been taken in open court by stipulation of parties; the said plaintiff and intervenors, being represented by Cook & Cook, as their attorneys, and said defendant by Walter J. Lamson and Bird J. Vincent, as his attorneys, and after listening to said proofs and argument of the respective attorneys, and upon due consideration thereof, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge and decree as follows:

I. That the lease or agreement in writing, bearing date the 7th day of April, 1919, marked Exhibit "A" in said plaintiff's bill of complaint, was made and executed by the parties thereto on Sunday, the 6th day of April, 1919, and was never subsequently ratified or confirmed by said defendant on any secular day, and is therefore, without binding effect upon either party thereto, is null and void.

II. That the claimed oral contract made between said plaintiff Lyle and said defendant was void under the statute of frauds of this state, and that there was not such a part performance of said oral agreement, and

not such a meeting of the minds of the parties in the terms of such oral agreement that will justify a court of equity in enforcing the performance thereof.

III. That the interest in the property mentioned in said bill of said intervening plaintiffs is dependent upon the rights of the plaintiff, William Lyle, to obtain the performance of said alleged oral contract, and they do not appear to have any equities independent thereof, and their bill of complaint is dismissed with cost to be taxed against them, according to the rules and practice of this court.

IV. The clerk of this court is ordered to pay to said defendant the sum of one hundred fifty (\$150.00) dollars, paid by said plaintiff, William Lyle, in court for the rent of said premises due on August 1st, 1919, and to take his receipt therefor.

V. The injunction issued by this court against said defendant restraining him from selling, assigning, mortgaging, or otherwise disposing of the land mentioned in said bill is hereby dissolved, and the bill of complaint of said plaintiff, William Lyle, and his amendments thereto are dismissed with costs to be taxed against him according to the rules and practice of this court.

ERNEST A. SNOW,

Dated October 27, 1919.

Circuit Judge.

(i) Authorities Cited by Plaintiff.—Brief for the Plaintiff.

Even if the writ of contract was actually executed on Sunday, equity will refuse to permit defendant to take advantage of that fact because of his own unconscionable conduct.

1. To deny the contract would be a fraud upon the plaintiff.

Equity will enforce a promise where a fraudulent omission to have it reduced to writing has lead to an irretrievable change of position, citing *Lamb v. Hinman*, 46 Mich. 112, on the proposition that the court had confidence in the testimony of witnesses who testified to the execution of the lease on Sunday, witnesses personally known to the court and in whom the court has confidence with respect to their veracity, counsel for plaintiff cites *Wigmore on Evidence*, Sec. 2569, and 16 Cyc. 51, as authority that no personal knowledge or acquaintance with witnesses the court may have gained outside of the courtroom could, under the established rules of evidence, be permitted to influence it.

Plaintiff also cites *Bushman v. Faltis*, 184 Mich. 172, as to the validity of the option of purchase; *Pearson v. Gardner*, 202 Mich. 360, *Meyer v. Haddon*, 148 Mich. 488, on part performance.

Under the principle that equity will enforce a promise where a fraudulent omission to have it reduced to writing has led to an irretrievable change of position, counsel cites *Pomeroy's Eq. Jur.*, 4th Ed., Sec. 2253; *Pete v. Pete*, 77 Cal. 106, 11 Am. St. Rep. 244; *Story's Eq. Jur.*, 768; *Atherly on Marriage*, 85; *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256.

2. Equity will relieve against a mistake of law accompanied by unequitable conduct on the part of one knowing and taking advantage of the mistake, citing *Pomeroy's Eq. Jur.*, Sec. 847; *Carpenter v. Detroit Forging*

Co., 191 Mich. 45 (see cases there cited); *Berry v. Whitney*, 40 Mich. 65; *South Carolina v. Gilbreth*, 208 Fed. 899, at page 923; *Bispham's Eq.*, par. 185; *Faxon v. Baldwin*, 114 N. W. 40; quoting also from 2 *Warvelle on Vendors*, par. 780, as follows:

"But where there has been a mistake on one side and fraud upon the other, where the guilty party, though not mistaken himself, well understood the other party's error, and knowing the same executed the contract intending to reap advantage from such error, while the mistake is unilateral, yet the fraud of the other party will justify equitable intervention equally as though such guilty party had made affirmative representations to induce the error."

In *Haviland v. Willetts*, 141 N. Y. 35, 35 N. E. 958, it appeared that plaintiff supposed that one of the legacies in his wife's will went to the children of the beneficiary when in reality plaintiff was entitled under the law to a share in it. Plaintiff released his right in the estate for a sum much less than it was actually worth to one who knew his legal rights and although defendant's counsel had explained the situation to plaintiff in technical language and where it did not appear that plaintiff understood his rights, the court held that he might on that showing, have the instrument set aside. The court said:

"It is equally well settled that where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair, and deceptive conduct, which tends to confirm the mistake and cancel the truth, it is the right and duty of equity to award relief. All the cases which deny a remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other."

Silliman v. Wing, 7 Hill 159; *Flynn v. Hurd*, 22 N. E. 1109; *Vanderbeck v. City of Rochester*, 25 N. E. 408.

3. To permit defendant to deny the contract would be against public policy.

In the application of the laws, a court of equity will not permit them to be made instruments of fraud and will refuse to permit a party to take advantage of them when because of his own inequitable conduct to do so would be clearly against public policy.

Cardwell v. Kelly, 95 Va. 570, 28 S. E. 953; *Clarke v. Littlepage*, 4th Rand. (Va.) 368; *Ten Eyck v. R. R. Co.*, 114 Mich. 494.

(j) Brief for Defendant.—The acts of part performance in this case were clearly insufficient.

Beemer v. Hughes, 179 Mich. 110.

1. A contract made on Sunday is illegal and void although dated on another day. *International Text Book v. Ohl*, 150 Mich. 132; *Acme Elec. Co. v. VanDerbeck*, 127 Mich. 345; *Harvey v. Petrie*, 100 Mich. 192; *Arbuckle v. Reaume*, 96 Mich. 243; *Adams v. Hamell*, 2 Doug. 73.

2. The fact that the vendee entered into possession and made improvements thereon and payments on the purchase price will not validate such a contract. *Berston v. Gilbert*, 180 Mich. 643.

CHAPTER IX

FORFEITURE OF LAND CONTRACTS POSSESSORY PROCEEDINGS BY VENDOR

- § 144. Remedies Available to the Vendor Upon Breach of the Contract by Vendee.—General Consideration.
- § 145. Michigan Doctrine of Forfeiture.—Generally.
- § 146. Forfeiture of Land Contract in Case of Death of One of Contracting Parties.
- § 147. First Step in Effecting Forfeiture of Contract.
- § 148. Where the Contract Waives Notice of Forfeiture.
- § 149. Notice of Forfeiture.—Forms.
- § 150. Waiver of Forfeiture On Default in the Contract.
- § 151. Courses Open to Vendor After Forfeiture.
- § 152. Action in Ejectment by Vendor.
- § 153. Vendor's Action in Ejectment, the Declaration.
- § 154. Ejectment, Declaration, Form.
- § 155. Vendee Estopped to Deny Vendor's Title.
- § 156. Actions in Ejectment by Vendor or Vendee Against Third Persons.
- § 157. Summary Proceedings by Vendor for Possession.
- § 158. Form of Complaint in Summary Proceedings.
- § 159. The Plea in Summary Proceedings.
- § 160. Incidents in Relation to Summary Proceedings.
- § 161. Service Where Defendant Cannot Be Found.
- § 162. Steps On Appeal From Circuit Court Commissioner.
- § 163. Form of Affidavit On Appeal.
- § 164. Bond On Appeal.
- § 165. Return On Appeal.
- § 166. Effect of Final Judgment in Possessory Proceedings.
- § 167. Effect of Registration of Writ of Restitution.
- § 168. Proceedings to Have Forfeiture Decreed.
- § 169. Bill of Complaint.—Form to Have Forfeiture Legally Established.
- § 170. Decree.—Form of Declaring Forfeiture Effected.

§ 144. Remedies Available to the Vendor Upon Breach of the Contract by Vendee—General Consideration.—Land contracts in general use in Michigan usually contain a provision that upon a breach of any of the terms and conditions thereof on the part of the vendee, the vendor shall have the right to declare such contract forfeited and may repossess himself of the premises. Before serving a notice of forfeiture in such cases due consideration should be given by the vendor to the

fact that if he elects to forfeit the contract, thereby terminating the contractual relation between himself and the vendee, he thereby waives the right to foreclose his vendor's lien in equity or to bring an action at law for future installments of the purchase price to become due, or to bring an action for specific performance of the contract against the vendee, or to pursue any other remedy which relies upon the existence of the contract.¹

Upon a breach of any of the material terms or conditions of a land contract the vendor has the right to pursue any one of the following remedies against the vendee:

1. He may declare the contract forfeited and make peaceable entry into possession of the premises, at the same time declar-

1. In a number of cases, the Supreme Court has announced that the following courses in equity are open to a plaintiff after a declaration of forfeiture has been served, to-wit: First, a suit in equity to foreclose the contract; second, an action in ejectment; third, summary proceedings under the statute.

See *Curry v. Curry*, 213 Mich. 316; *Lampkins Loan & Investment Co. v. Adams*, 132 Mich. 350.

But considering the nature of the remedy of foreclosure, it would seem that the action in foreclosure was an affirmation of the existence of the contract and entirely inconsistent with the declaration of forfeiture.

Pomeroy in his admirable work on equity, fourth edition, section 1262, in speaking of the action of foreclosure, "The equity action to enforce the so-called lien is simply an action to compel the vendee to make payments of the purchase price within a specified time, or else be barred of all rights under the contract."

Since the action of foreclosure is a proceeding to collect the pur-

chase price, and is inconsistent with the severance of contractual relations between the parties, how can the vendor maintain such action, after having severed such contractual relations by notice terminating the contract, if the vendee objects?

We do not find where the question has been presented, but there are decisions holding that an action to foreclose the contract waives any previous declaration of forfeiture.

Old Second National Bank v. Savings Bank, 115 Mich. 553; *Mayday v. Roth*, 160 Mich. 190; *John v. McNeil*, 167 Mich. 151.

A careful examination of the foregoing cases in which those statements occur that the vendor may file a bill to foreclose his vendor's lien after service of a declaration of forfeiture, will disclose that such statements are dicta and were not necessary to decide the case, and the principle that after a declaration of forfeiture, the vendor cannot collect the purchase price by bill to foreclose, seems unassailable.

ing that he takes possession for the purpose of making the forfeiture effectual. The vendor, however, may not take possession in this manner unless, permitted so to do by the vendee. A voluntary surrender under such circumstances of the premises by the vendee afterwards estops him from asserting any rights therein.²

2. He may declare the contract forfeited, and begin proceedings for possession either by an action in ejectment or by summary proceedings before a circuit court commissioner. Either one of such possessory actions is consistent with the forfeiture of the contract.³

3. He may bring an action of law for whatever installments of the purchase price have become due and are unpaid.⁴

4. He may foreclose the vendor's lien by an action in chancery, in which event he waives the right to declare such contract forfeited. He may pursue both his action at law for the installments of the purchase price and resort to a foreclosure of his vendor's lien at the same time.⁵

5. He may sue the vendee for damages for non-performance of the contract.⁶

6. He may bring an action for specific performance of the contract against the vendee, even though the vendee's undertaking is only for the payment of money.⁷

7. In many cases courts of equity will relieve the defendant from the forfeiture of the contract where such forfeiture has been declared by the vendor.⁸

For a full discussion of the foregoing remedies available to the vendor, and defensive measures which the vendee may

2. See Sec. 144, Post; Gates Real Property, Sec. 613; Pendill v. Union Mining Co., 64 Mich. 172; Laetz v. Tierney, 153 Mich. 279 (281-282); Alexander v. Hodges, 41 Mich. 691 (694).

3. See Sections on Summary Proceedings, Sec. 157-161 Post, and the Vendor's Remedy of Ejectment, Post.

4. Carter v. Reaume, 159 Mich. 160; Higney v. Swan, 111 Mich.

161; Allen v. Mohn, 86 Mich. 3281; Gates Real Property, Sec. 617.

5. See Vendor's Remedy of Foreclosure, Chapter XI Post; Gates Real Property, Sec. 617; Pearson v. Gardner, 202 Mich. 360.

6. Carter v. Reaume, 159 Mich. 160.

7. See Chapter on Specific Performance, Ante (Chaps. 7 and 8).

8. See Sec. 171-172, Post, Relief from Forfeiture.

take to protect his interests, reference should be had to the various chapters and sections of this treatise cited in the notes below.⁹

§ 145. **Michigan Doctrine of Forfeiture—Generally.**—Legally defined, a forfeiture is a loss suffered by way of penalty for some misconduct or negligence. The term, as used here, denotes the divestiture of property without compensation to the owner in consequence of some default or act forbidden in the contract.¹⁰

Forfeitures and penalties are regarded with disfavor by courts everywhere, but the Supreme Court of Michigan has especially emphasized this disfavor from its earliest decisions down to the present time. The attitude of the Michigan Supreme Court towards penalties and forfeitures has been succinctly stated by Judge Christiancy in the early and leading case of *Jaquith v. Hudson* (5 Mich. 126). In construing the provisions of a contract to determine whether or not a provision requiring the payment of a given sum upon default in the contract was liquidated damages or a penalty, Judge Christiancy said, "It is the application in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained. This principle may be stated, in other words, to be that the courts of justice will not recognize or enforce a contract or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy, as to make it rather matter of surprise that courts of law had not always, and in all cases adopted it to the same extent as courts of equity." As to when the courts

9. See Specific Performance of Land Contracts (Chapters 7 and 8); Action in Ejectment by Vendor, Sec. 152 Post; Summary Proceedings by Vendor for Possession, Sec. 157; Relief from Forfeiture, Sec. 171 Post.

10. *Dailey, et al. v. Litchfield*, et al., 10 Mich. 38; *Davis v. Freeman*,

10 Mich. 191; *Richmond v. Robinson*, 12 Mich. 201; *Jaquith v. Hudson*, 5 Mich. 123; *Myer v. Hart*, 40 Mich. 523; *Lamson v. City of Marshall*, 133 Mich. 263; *Tp. of Springwells v. Detroit, Etc., Ry.*, 140 Mich. 279; *Powell v. Dwyer*, 149 Mich. 146; *Rose v. Loescher*, 152 Mich. 385; *Miner v. Husted*, 191 Mich. 41; *Decker v. Pierce*, 191 Mich. 71

will apply this principle, Judge Christiancy further says, "But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties would violate this principle, which alone the court recognizes as the law of the contract." In conformity with the doctrine expressed in *Jaquith v. Hudson*, the courts of Michigan have in a great variety of cases refused to allow the damages stipulated in the contract, and held the parties to actual damages.¹¹

Thus, in harmony with this principle, the courts have refused to enforce the provisions of promissory notes providing for attorney fees, and have held as unconstitutional the statute expressly authorizing the collection of such attorney fees, holding that it was against the well-settled policy of Michigan to enforce penalties of that character.¹²

For the same reason, provisions in mortgages for attorney fees in excess of the statutory rates, have been held invalid and against the public policy.¹³

As a further example of this principle, where a piano was sold on a conditional contract of sale and was afterwards taken

11. 19 Cyc. 1357; *Maryland v. Baltimore & Ohio R. R. Co.*, 44 U. S. (3 How.) 534, 11 L. Ed. 714; *Words and Phrases*, Page 611.

In the following cases the court disregarded the express agreement of the parties and held them to only actual damages: *Trustee of Church v. Walrath*, 27 Mich. 234; *Meyer v. Hart*, 40 Mich. 523; *Daily v. Litchfield*, 10 Mich. 188; *Condon v. Kemper*, 13 L. R. A. 671; *Ross v. Leecher*, 152 Mich. 589.

12. A provision in a promissory note providing for the payment of an attorney fee is void because as a measure of damages it disregards any theory or principle of compen-

sation. *Bullock v. Taylor*, 39 Mich. 137; *Trustee v. Walrath*, 27 Mich. 232; *Jaquith v. Hudson*, 5 Mich. 123; *Davis v. Freeman*, 10 Mich. 188; *Myer v. Hart*, 40 Mich. 523; *Louder v. Burch*, 47 Mich. 111; *Millard v. Truax*, 47 Mich. 252; *Wright v. Traver*, 73 Mich. 495; *Crump v. Berdan*, 97 Mich. 295; *Kittermaster, Executor, Etc., v. Hubert Brossard and Annie Brossard*, 105 Mich. 220; *Green v. Grant*, 134 Mich. 466.

13. Where a trust deed stipulated that upon foreclosure a solicitor should have a fee of \$100.00, such a provision was held to be contrary to public policy and therefore, unenforceable. *Curtis v. Miller*, 184 Mich. 151.

back by the vendor, the court required him to account to the vendee for the money paid under such contract.¹⁴

While these decisions do not relate to land contracts, the principles announced in such decisions should be kept in mind by the members of the profession in examining propositions of law relating to the enforcement of forfeitures in contracts for the sale of real estate.

§ 146. Forfeiture of Land Contract in Case of Death of One of Contracting Parties.—It is provided by recent statute that where a person shall have contracted to convey real estate, and shall have died subsequent to the execution of such contract, leaving such contract subsisting and in force, the executor or trustee under the will, administrator of such decedent's estate, or the guardian of a minor, if such minor be the owner of the interest, may demand and enforce payment of the moneys part due or falling due on such contract and in case a cause of forfeiture of such contract shall have accrued or shall accrue after such death, may declare such contract forfeited. The statute also applies to the guardian of persons who have been adjudged insane, incompetent or spendthrift.

The statute farther provides that when any such contract shall have been forfeited, as aforesaid, of such lands and rights and claims in and to such lands, shall to all intents and pur-

14. In the case of *Preston v. Whitney*, 23 Mich. 259. In requiring the vendor of a piano contract to account to the vendee for a payment made on account of a piano contract the court held:

"The defendant having received \$100 of plaintiff's money paid only in consideration of the proposed purchase and having taken the property back which constitutes the consideration and having terminated the contract upon which it was paid has so much money in his hands for which he should account to the plaintiff upon just and equitable principles, he doubtless would have the right to deduct from

the amount a fair compensation for the use of the piano during the period of time it remained with the plaintiff. But he would have no right to, under the terms of this agreement to claim a forfeiture of all the money paid beyond reasonable compensation." Pp. 266, 268,

In the case of *Davis v. Trowbridge*, 44 Mich. 159, the court followed the foregoing decisions holding that where the plaintiff put an end to the contract there was a failure of consideration as to the payments defendant had already made and that the plaintiff became liable to pay back what the defendant had paid.

poses be thenceforth deemed to be held and shall be treated in the same manner as land purchased at mortgage sales by executors or administrators under and in pursuance of Section 13856 of the Compiled Laws of 1915.¹⁵

15. In case a person shall have contracted, or shall contract to convey any land, or right, interest, or claim in or to lands, and shall have died, or shall die, before he shall have executed, or shall execute, deeds or conveyances in pursuance of such contract, leaving such contract subsisting and in force; or if such contract shall have been assigned, or shall be assigned, then if the assignee of such contract, entitled to the benefit thereof, and grantee of such contracted premises subject to the contract, shall have died, or shall die, or if such person or the assignee of such contract shall have been adjudged, or shall be adjudged, insane, incompetent, or a spendthrift, before deeds or conveyances shall have been executed of the contracted premises in pursuance of such contract, leaving such contract subsisting and in force, or if the owner of such vendor's interest is a minor, the executor of the will, or trustee under the will, or administrator of the estate of such deceased person, or guardian of such ward, whether the party contracting or his assignee, may demand and enforce payment of the moneys part due or falling due on such contract, and in case a cause of forfeiture of such contract shall have accrued, or should accrue, and not waived, may declare such contract forfeited.

"That when the contract for any lands, or any right, interest or claim in or to lands heretofore contracted to be sold, shall have been

forfeited, and shall have been duly declared to have been forfeited, as aforesaid, all such lands and rights, interests and claims in or to lands, shall, to all intents and purposes, be thenceforth deemed to be held, and shall be treated in the same manner, as lands purchased at mortgage sales by executors or administrators under and in pursuance of section thirteen thousand eight hundred fifty-six of the Compiled Laws of nineteen hundred fifteen. Approved May 13, 1919."

The referred sections of the Compiled Laws of 1915, provide as follows:

"When any mortgagee of real estate, or any assignee of such mortgage, shall die without having foreclosed the right of redemption, all the interest in the mortgaged premises conveyed by such mortgage, and the debt secured thereby, shall be considered as personal assets in the hands of the executor or administrator; and he may foreclose the same, and have any other remedy for the collection of such debt which the deceased would have had if living, or may continue any proceeding commenced by the deceased for that purpose.

In case of the redemption of any such mortgage, or the sale of the mortgaged premises by virtue of a power of sale contained herein or otherwise, the money paid thereon shall be received by the executor or administrator, and he shall thereupon give all necessary releases and receipts; and if, upon

§ 147. **First Step in Effecting Forfeiture of Contract.**—The first step, unless the contract waives notice of forfeiture, in effecting a forfeiture of a land contract for a material breach thereof is a service upon the vendee of a notice that the vendor elects to declare the contract forfeited and terminated.¹⁶

Mere default in the condition of a land contract by the vendee will not, of itself, terminate the land contract. The forfeiture clause in such contract usually provides that upon default by the vendee in the terms of such contract the vendor shall have the right to declare the contract forfeited, and a breach of the contract or default in its terms, no matter how long continued, will not, of itself, work a forfeiture, unless the contract so provides.¹⁷

a sale of the mortgaged premises, the same shall be bid in by the executor or administrator for such debt he shall be seized of the same. for the same persons, whether creditors, next of kin or others, who would have been entitled to the money, if the premises had been redeemed or purchased at such sale by some other person.

Any real estate which may have been purchased or which may hereafter be purchased by an executor or an administrator as such, upon a sale on execution for the recovery of a debt due to the estate or upon a sale in the foreclosure of a mortgage held by said executor or administrator (whether owned by the deceased in his lifetime or acquired after his death), shall be considered as personal estate and may be sold and conveyed by said executor or administrator in like manner as personal estate may now be sold, and the proceeds thereof shall be held and divided as personal estate: Provided, Such sale shall first be approved by the judge of probate having jurisdiction of such estate by an order entered in

the journal of the court, a copy of which order shall be attached to and recorded with the deed given by such executor or administrator.

If any land so held by an executor or administrator as mentioned in the preceding section, shall not be sold by him as therein provided, it shall be assigned and distributed to the same persons, and in the same proportions, as if it had been part of the personal estate of the deceased; and if, upon such distribution, the estate shall come to two or more persons, partition thereof may be made between them, in like manner as if it were real estate which the deceased held in his lifetime."

16. *John v. McNeal*, 167 Mich. 148; *Nelson v. Smith*, 161 Mich. 363; *Corning v. Loomis*, 111 Mich. 23; *Miner v. Dickey*, 140 Mich. 518.

17. *Converse v. Blumrich*, 14 Mich., 109 (90 Am. Dec. 230); *Miner v. Dickey*, 140 Mich. 518 (103 N. W. 855); *Murphy v. McIntyre*, 152 Mich. 591 (116 N. W. 197); *Nelson v. Smith*, 161 Mich. 363 (126 N. W. 447); *Mich. Land & Iron Co. v. Thoney*, 89 Mich. 226.

The notice from the vendor to the vendee declaring the contract forfeited, and terminated may either be given orally or in writing, the better practice being, of course, to serve this notice in writing, and retaining a copy in order to make proof of service.¹⁸

The notice of forfeiture should be given even though the vendor makes a peaceable re-entry into the possession of the property. Unless the vendor shall give to the vendee notice declaring the contract forfeited and terminated, the vendor cannot maintain either ejectment proceedings or summary proceedings for possession of the property.¹⁹

Merely taking possession of the premises by the vendor without declaring the contract forfeited does not terminate the contractual relations of the parties.²⁰

§ 148. Where the Contract Waives Notice of Forfeiture.—Where the contract contains a provision waiving notice of forfeiture, no notice is necessary before beginning proceedings to obtain possession, and the vendor may upon default in the contract have open to him all remedies and proceedings which would have been available to him in event notice were given.²¹

§ 149. Notice of Forfeiture—Forms.—The notice of forfeiture should describe the contract briefly, giving the date, name of the parties, the description of the real estate, and should specify the particular default in the contract for which the forfeiture is declared. The notice should unequivocally state that the vendor elects to declare the contract forfeited, and that he terminates by such notice all contractual relations with the vendee. The following is a form in general use among the profession:

..... Mich.,.....19.....

To (here name of vendee) :

You are hereby notified that a certain land contract bearing date the.....day of, 19....., by and between (John Jones), party of the first part, and (William Smith), party of the second part, is in default by reason of the non-

18. See cases cited above in notes 17, supra.

19. See cases cited in notes 16 and 17 supra.

20. See cases cited in notes 16 and 17 supra.

21. Wellington v. Strickland, 161 Mich. 235.

payment of the installments of principal and interest due thereunder, and you are hereby further notified that said (John Jones), elects to declare and does hereby declare said land contract forfeited, and you are hereby further notified to yield, surrender and deliver up possession of the premises in said land contract mentioned and of which you are now in possession under and by virtue of the terms thereof. Said premises are described in said land contract as follows, viz.: (here give description of property).

(Signature).....

(Proof of Service.)

STATE OF MICHIGAN,
COUNTY OF.....} ss.

.....being first duly sworn says that on the.....day of....., 19....., he served a notice of which the above is a true copy, on....., by.....

Subscribed and sworn to before me this.....day of....., 19.....

.....
Notary Public,.....Co., Mich.

My commission expires.....

The following more amplified form was used in a case which came before the Michigan Supreme Court.²²

"Please to take notice that by reason of the failure on your part to perform the covenants and agreements by you to be performed under the provisions of a certain agreement in writing entered into the.....day of....., A. D., by and between the undersigned, as party of the first part, and (here name of other party), party of the second part wherein the undersigned did agree to convey to the above mentioned (name of party), the following described real estate, viz.: (here describe the real estate) in that you have utterly failed, neglected, and refused to pay to the undersigned any part of the purchase price of said described land as provided in said agreement and have utterly failed, neglected, and refused to pay to the undersigned any of the interest upon said purchase price, the undersigned has elected to consider him-

22. Cornell v. Norton, 188 Mich. 191.

self released and discharged of and from any and all liability on any of the covenants specified to be done and performed on his part, and the undersigned does hereby elect to consider himself so released and discharged, and the undersigned does hereby declare the said agreement and all of your rights thereunder forfeited by you for the reasons above set forth and for the reason that you have failed and refused to fulfill and perform the agreements which by the terms of said agreement were to be fulfilled and performed by you.

"And you will also please take notice that you are hereby required to quit, surrender, and deliver up possession to me of the premises hereinbefore described, which you now hold of me as my tenant, on or before the.....day of....., A. D., for the reason that I intend to terminate your tenancy and repossess myself of such premises on the date above mentioned.

"Dated this.....day of....., A. D."

(Signature).....

§ 150. Waiver of Forfeiture on Default in the Contract.—If the vendor, even after declaring a forfeiture of the contract, pursues a course of conduct inconsistent with a severance of contractual relations with the vendee, he thereby waives such forfeiture or the right to declare one, thus dealing with the vendee as though the contract existed, by demanding payment after repeated default on the part of the vendee, or by a conditional demand for the property as by notifying the vendee he must pay up or get out, thereby giving him the right to either pay up or surrender the premises, or by acceptance of one or more payments due on the contract, or by starting a suit to foreclose the vendor's lien, any of these acts affirm the existence of the contract and waives and default previously made by the vendee, and even waives any previous declaration of forfeiture.²³

23. "In relation to these, we may say that the evidence convinces us that the complainants did refuse to perform the contract according to its strict letter, and defaulted in payment when they declined to pay the amount due at

the time the deed was tendered. Thereupon Mitchell served notice with a view to terminating the contract. Whether, under the terms of the contract, this notice was a sufficient one to support proceedings at law to enforce a forfeiture,

Where the vendor had neglected to furnish an abstract as he agreed, at the date named for closing the transaction, and both parties continued thereafter to negotiate without claiming a forfeiture, they may, by such conduct, thereby waive the failure to close such transaction on the appointed day.²⁴

The parties may by oral agreement extend the time for payment as provided in the contract, and if this is done, the vendor thereby waives the right to declare the contract forfeited or rescinded if payments are made in accordance with such oral agreement.²⁵

After a vendor has elected to forfeit a contract he cannot thereafter maintain an action for the purchase price.²⁶ Having elected to terminate the contractual relations between himself and the vendee, he thereby waives any action which is predicated upon existence of the contract.²⁷

we need not inquire, as no such proceedings were taken by Mitchell. On the contrary, he chose to treat the contract as continuing, and began proceedings with a view to enforcing its provisions, by collecting the contract price, through foreclosure of the vendor's lien. We must, therefore, conclude that any meditated forfeiture was waived, the effect of the notice was nullified and the status of complainants thenceforth was that of vendees in default." *Old Second National Bank v. Savings Bank*, 115 Mich. 553; *Maday v. Roth*, 160 Mich. 290; *John v. McNeal*, 167 Mich. 151.

24. *Frazer v. Hovey*, 195 Mich. 160.

25. *Bugajski v. Siwka*, 200 Mich. 415.

26. *Maday v. Roth*, *supra*.

27. *Goodspeed v. Dean*, 12 Mich. 352. Where a vendee having on default by the vendee, elected to treat as void a contract which he had given for the sale of lands and having given the vendee notice to quit, must be regarded as hav-

ing relinquished his right to the amount then due on the contract. He cannot treat the contract as void in respect to the rights which it secured to the vendee, and valid in respect to those which it secured to himself.

One who with knowledge of facts which would enable him to rescind a contract accepts benefits under it is estopped from thereafter assailing its validity. 15 N. D. 239-107 N. W. 45.

A vendor who has once waived a forfeiture incurred or declared can not again insist on such forfeiture except in case of a subsequent default, not within the perview of the waiver. *Moffett v. Oregon & C. R. Co.*, 80 Pac. 489, 46 Or. 443.

See also, *Walsh v. Ford*, 277 Ex. Civil App. 573, 66 S. W. 854.

Where vendee told a vendor that as to an overdue payment he would try to raise it in a few days and vendor said nothing, held a waiver of the default in meeting payments promptly. *Cue v. Johnson*, 85 Pac. 598-73, Kan. 558.

§ 151. **Courses Open to Vendor After Forfeiture.**—Upon the execution and service of a notice of forfeiture upon the vendee, the following courses are open to the vendor:

1. He may demand and receive from the vendee a voluntary surrender of possession of the premises, in which event obviously no legal steps would be necessary to obtain such possession.²⁸

2. He may bring an action in ejectment for possession of the premises.²⁹

3. He may resort to summary proceedings before a circuit court commissioner to obtain possession of the premises. As each one of the above named proceedings has its advantages and disadvantages, careful consideration should be given to form of possessory action which the vendor selects.³⁰

The vendor in a land contract by filing a bill in equity to foreclose his vendor's lien waives the benefit of a prior notice

For collection of cases on above subject see Decennial Digest, Sec. 95, under Vendor and Purchaser.

28. *Laetz v. Tierney*, 153 Mich. 279 (281-282). Right sustained where the landlord entered peaceably and afterwards retained possession by force.

Detroit Building & Loan Assn., 115 Mich. 340 (346-251). Where the vendor entered peacefully and afterwards expelled the vendee by force.

Kennedy v. Ford, 183 Mich. 48. The authorities are collected in this case.

29. Ejectment is the remedy to recover possession of real estate where the plaintiff has a valid and subsisting interest in the premises. *Lambton v. Investment Co.*, 132 Mich. 353; *Covert v. Morrison*, 49 Mich. 133; *Bertram v. Cook*, 44 Mich. 396; *Wilkinson v. Williams*,

51 Mich. 156; *Comp. Laws* (1915) Sec. 13169: The action of ejectment may also be brought: 1. In the same cases in which a writ of right might formerly be brought to recover lands, tenements, or hereditaments, and by any person claiming an estate therein, in fee, or for life, either as heir, devisee, or purchaser. *Comp. Laws* (1915) Sec. 13170.

Sec. 3. No person can recover in ejectment unless he has at the time of commencing the action a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or some share, interest or portion thereof, to be proved and established at the trial.

30. *Compiled Laws* (1915) Sec. 13240-13257. Providing various steps to be taken by summary proceedings to recover possession of real estate.

of forfeiture for default in payment, and will not thereafter be permitted to rely upon a forfeiture of said contract.³¹

5. In selecting the remedy of summary proceedings due consideration should be given to the fact that it is provided by statute that where such proceedings are brought for the recovery of real estate by reason of failure to pay any installment which may become due on a land contract, the vendee shall have the right to pay the arrears on such contract and have the same reinstated within thirty days after a judgment for the restitution of the premises has been entered. Therefore, if the vendor desires to obtain possession of the premises and not to enforce payment, the remedy in ejectment may be more suitable to his requirements.³²

In selecting the action of ejectment by vendor to obtain possession it should be borne in mind that the vendee can not in such action assert any equitable defenses, such as relief from forfeiture, as the action in ejectment is strictly a legal action and admits of no defenses of that character.³³

§ 152. Action in Ejectment by Vendor.—Proceedings in ejectment in the State of Michigan are wholly statutory,³⁴ and

31. Lambton Investment Co. v. Adams, 132 Mich. 350. Old Second National Bank v. Sav. Bk., 115. 548; Curry v. Curry, 213 N. W. 309.

Where a vendor filed a bill in equity to foreclose a vendor's lien for the contract price, the Supreme Court held that the effect of the notice of forfeiture was nullified by the institution of such proceedings.

32. Cummings & Beechers supplement section 1375, Public Acts 1917, No. 243, provides that no writ of restitution will issue in summary proceedings upon any executory contract for the purchase of real estate for a period of thirty days after judgment, and then not at all if the defendant shall pay the amount found due on the contract together with the costs to the plaintiff.

33. Ejectment involves the legal title only and not equitable interests or claims. Ryder v. Flanders, 30 Mich. 336; Whiting v. Butler, 29 Mich. 122; Conrad v. Long, 33 Mich., 78; Jeffrey v. Hursh, 42 Mich. 563; Buell v. Irwin, 24 Mich. 145; Harrett v. Kinney, 44 Mich. 457; Van Auken v. Livingston, 34 Mich. 384; Moran v. Moran, 106 Mich. 12; Mich. L. & I. Co. v. Thoney, 89 Mich. 231; Paldi v. Paldi, 95 Mich. 410; Geiges v. Greiner, 68 Mich. 153; Shaw v. Hill, 83 Mich. 327; Yale v. Stevenson, 58 Mich. 537. See Nims v. Sherman, 43 Mich. 45; White v. Hapeman, 43 Mich. 267.

34. The action of ejectment is governed by Compiled Laws (1915), (1915), Sec. 13168-13228, inclusive.

radical changes have been made in the proceedings by recent statutes. The principal changes are:

1. A suit in ejectment is now commenced in the same manner as personal actions, i. e., either by a notice to plead attached to the declaration or by the issuance and service of a summons.³⁵

2. The use of fictitious names of the plaintiff or defendant has been abolished.³⁶

3. The defendant no longer has a new trial as a matter of right.³⁷

4. Where no personal service has been had upon the defendant or no appearance has been entered in the case by the defendant, the judgment in ejectment becomes conclusive after three years.³⁸

Other changes in regard to declarations will be noted in the following section:

If the premises for which the action is brought to recover are actually occupied by any person, such actual occupant must be named as a defendant, but if not so occupied, then the action must be brought against some person exercising acts of ownership on the premises claimed or claiming title thereto or some interest therein.³⁹

It has been held that mortgagees before foreclosure and sale are not proper parties defendant;⁴⁰ and that a wife is not a necessary party where the homestead is not concerned.⁴¹ But where the action concerns the recovery of a homestead, then the wife is a necessary party.⁴²

Where, however, the plaintiff is proceeding in ejectment after the foreclosure of a mortgage, the mortgagee should be

35. Compiled Laws (1915), Sec. 13172.

36. Compiled Laws (1915), Sec. 13173.

37. Compiled Laws (1915), Sec. 13197.

38. Compiled Laws (1915), Sec. 13198.

39. Compiled Laws (1915), Sec. 13171.

40. Dawson v. Peter, 119 Mich. 281.

41. Bunce v. Bidwell, 43 Mich. 542.

42. Kalkes v. Stormes, 93 Mich. 480; Hodson v. Van Fossen, 26 Mich. 68; Henry v. Gregory, 29 Mich. 68; Rowe v. Kellogg, 54 Mich. 206; Sayles v. Curtis, 45 Mich. 279; Haviland v. Chase, 116 Mich. 216.

made a party defendant.⁴³ Both landlord and tenant are proper defendants.⁴⁴

Where the plaintiff fails to join one who occupies a distinct portion of the premises, recovery as to that portion will be excluded.⁴⁵

The legal interest mentioned in the statute means a legal interest and not a mere equitable.⁴⁶

An action in ejectment is not barred after ten years occupancy if it does not appear that the defendant's possession was adverse to the plaintiff.⁴⁷

§ 153. Vendor's Action in Ejectment—The Declaration.—

1. The statute provides that it shall be sufficient for the plaintiff to aver in his declaration that on some day, therein to be specified and which shall be after his title or right accrued, he, the plaintiff, was possessed of the premises in question, and being so possessed the defendant afterwards, on some day to be stated, entered into such premises and that the defendant unlawfully withholds from the plaintiff the possession thereof to his damage in any nominal sum the plaintiff shall think proper to state.⁴⁸

2. It is also provided by statute that the plaintiff shall attach to his declaration, and the defendant to his plea, if he claims title, a statement of the title relied upon, showing from and through whom such title was obtained.⁴⁹

In view of the fact that under the decisions the vendee is estopped to deny the vendor's title, it is doubtful if the requirements of the statute with reference to attaching a statement of the title relied upon is necessary. It would seem to be sufficient for the plaintiff to attach to his declaration a copy of the land contract under which the vendee obtained possession of the property.⁵⁰

43. Haviland v. Chase, 116 Mich. 216.

44. Powers v. Scholtens, 70 Mich. 299.

45. Hendricks v. Rasson, 42 Mich. 104.

46. Dawson v. Peter, 119 Mich. 181.

47. Perkins v. Nugent, 45 Mich. 146.

48. Compiled Laws (1915), Sec. 13174.

49. Compiled Laws (1915), Sec. 13184.

50. See Sec. 155, Post.

§ 154. Ejectment Declaration Form.⁵¹

"The plaintiff says:

1. That on....., 19....., the plaintiff was possessed of the following premises: (here describe them), which he claims in fee (or for his life, or as the case may be).

2. That while the plaintiff was so possessed, the defendant afterwards, on....., 19....., entered into said premises.

3. That the defendant voluntarily withholds from the plaintiff the possession thereof.

4. Wherefore the plaintiff claims a judgment for the possession of said premises and damages in the sum of \$....."

§ 155. **Vendee Estopped to Deny Vendor's Title.**—Where the vendee has been put into possession of the land by the vendor and continues to retain that possession from the vendor, he is estopped from setting up in his defense, in contesting any action brought against him by the vendor based on the contract of sale, that the vendor is not owner of the property in question.⁵²

51. Form 32 prepared by the Committee on new rules under the Judicature Act appointed by the State Bar Association, consisting of Alva M. Cummins, Edison R. Sunderland, Alfred J. Mills, William W. Potter and Judge Chester L. Collins. Draft of this declaration was prepared by Professor Edison R. Sunderland, acting for the committee.

52. He had recognized her title and was not in a position to disavow it or to obtain for his own benefit a title hostile to it. By his conduct he held the land in trust for her, and equity will compel him to transfer it to her. *Galloway v. Finley*, 12 Pet. (U. S.) 264; *Kirkpatrick v. Miller*, 50 Miss. 521; *Stephens v. Black*, 77 Pa. 138; *Peay v. Capps*, 27 Ark. 160; *Cromwell v. Craft*, 47 Miss. 44; *Mitchell v. Chisholm*, 57 Minn. 148. See also, *Thredgill v. Pintard*, 12 How. (U. S.) 24.

"The vendor and vendee (of land) stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title." *Galloway v. Finley*, 12 Pet. (U. S.) 295.

"After doing homage to his vendor's title by purchase and entry under it, the vendee will not be tolerated to repudiate his allegiance to it, and transfer it to another title acquired whilst thus in possession. If such after-acquired title should be paramount the vendee shall be esteemed as holding it in trust for his vendor, as having provided it to support and maintain his possession, and his right under his original vendor.

"Whilst a court of equity holds the vendee to entire good faith to his vendor, and will not allow him to get in an outstanding title or encumbrance and set it up in opposition to his vendor, yet it will lend its aid to reimburse all reasonable

But where the vendee has been ejected from the land by a paramount title, or has surrendered possession of the land to one who holds a title superior to that of the vendor, the vendee may, in any action between him and the vendor, prove that the latter had no title to the land, or if he had a title the same had been terminated.⁵³

In those cases where the vendor has not the power to make a merchantable title, the vendee may perfect the title at his own risk and expense, and the courts will require the vendor to reimburse him for his expenses thus incurred.⁵⁴

Where a vendee acquires a paramount title while holding possession under the vendor, equity will treat such vendee as a trustee for the vendor because he holds under the latter.⁵⁵

§ 156. Actions in Ejectment by Vendor or Vendee Against Third Persons.—It is provided by statute ⁵⁶ that no person can recover real estate in an action of ejectment unless he has the right to recover the possession thereof at the time of the trial. Under the decisions where the vendee is entitled to possession of the real estate the vendor can not maintain ejectment against any stranger or intruder who secures possession of the real estate covered by the contract between the vendor and

advances expended to fortify the title. At the same time it will rebuke every attempt by the purchaser to betray or invalidate the title." *Kirkpatrick v. Miller*, 50 Miss. 527.

"A vendee under articles may set up an outstanding title not in himself, but when he buys such title, he is trustee of his vendor, and is entitled only to what he paid to perfect the title." *Stephens v. Black*, 77 Pa. 138.

"A vendee in possession under a contract of sale can not retain possession and avoid payment of the balance of the purchase money on the ground that the vendor can not make as good a title as agreed. Before he can avail himself of such

defense he must offer to rescind the contract." *Peay v. Capps*, 27 Ark. 160.

"A vendee, continuing to hold the possession of land to which his vendor admitted him, cannot acquire an adverse title and set it up against his vendor." *Cromwell v. Craft*, 47 Miss. 44.

"While a vendee remains in possession he is estopped from denying the plaintiff's title, whether it is good or bad." *Mitchell v. Chisholm*, 57 Minn. 148; 144 Mich. pp. 358-359.

53. *Gates Real Property*, Sec. 608.

54. *Gates Real Property*, Sec. 608.

55. *Gates Real Property*, Sec. 608.

56. *Compiled Laws* (1915), Sec. 13170.

vendee, as such right, together with possession, rests with the vendee.⁵⁷

§ 157. Summary Proceedings by Vendor for Possession.—It is provided by statute that when any person holds real estate contrary to the provisions of any executory contract for the purchase thereof, the person entitled to possession may make complaint in writing under oath and deliver same to the circuit court commissioner or justice of the peace, which complaint shall set forth that the person complained of is in the possession of lands or tenants in question, describing them, and that such person holds the same unlawfully and against the rights of the plaintiff.⁵⁸ Upon receiving such complaint, the officer to whom the same is delivered shall issue a summons directed to the sheriff or to any constable of the same county, commanding him to summon the defendant to appear before such officer at a time and place therein to be specified, not less than three nor not more than six days from the issuing thereof, to answer to such complaint. The officer is required to serve said summons on the defendant at least two days before the time of the appearance mentioned therein, but if he is unable to find such defendant then service may be made by leaving a copy at the usual place of abode of such defendant in the presence of some person of suitable age who shall be informed of its contents.

§ 158. Form of Complaint in Summary Proceedings.—The following is a form of complaint in common use in summary proceedings for the possession of real estate.

57. *Kuite v. Lage*, 152 Mich. 638-639. This case holds that the vendee under an executory contract of purchase, is the person entitled to maintain ejectment against a stranger who ousts him for the land, citing in support the following cases: *Covert v. Morrison*, 49 Mich. 135; *Olin v. Henderson*, 120 Mich. 149; *Michigan Land and Iron Company v. Thoney*, 89 Mich. 226; *Bay County v. Bradley*, 39 Mich. 163; *Van Vleet v. Blackwood*, 39

Mich. 728; *Corning v. Loomis*, 111 Mich. 23.

58. *Summary Proceedings for the Recovery of Land*, Sec. 13240 to Sec. 13252, *Compiled Laws 1915*.

Sec. 1375 *Cummings and Beecher supplement to Judicature Act*.

P. A. 1917, Sec. 243. Amending former act so that vendee has thirty days from date of Judgment to pay up same.

State of Michigan,
County of..... } ss.

To (herein insert name of Commissioner or Justice of the Peace as case may be), of.....County, Michigan.

The complaint of (here insert name of complainant), of said county and State, that, (here insert names of vendees or those in possession), of the following described lands and tenements situated in, (here give location of premises), said County and State, to-wit; (here describe real estate).

That the defendants (here insert names of those in possession), hold said premises unlawfully against the rights of the plaintiff and that said plaintiff is entitled to the possession of the same.

Wherefore, this Plaintiff prays that proceedings may be had according to the statute in such cases made and provided, and that the possession of said premises may be restored to said Complainant.....

State of.....
County of..... } ss.

On this.....day of....., A. D. 192...., personally appeared before me, the said.....and on oath says, that he heard read the foregoing complaint, by him subscribed and knows the contents thereof, and that the same is true.

.....
Title of Officer.

§ 159. The Plea in Summary Proceedings.—The only plea contemplated by the statute is “not guilty.” If the defendant shall neglect or refuse to plead the officer before whom such proceedings are pending, shall enter a plea of not guilty for him and the issue as to whether or not the plaintiff is entitled to the possession of the premises shall be tried and judgment shall be rendered and the same proceedings shall be had thereon in all respects as in cases of forcible entry and detainer and with a like effect.⁵⁹

§ 160. Incidents in Relation to Summary Proceedings.—Where the defendant enters a plea of not guilty, such plea

59. Compiled Laws, Sec. 13244.

waives irregularities in the summons and venire.⁶⁰ The circuit court commissioner is not obliged to wait one hour for the defendant to appear.⁶¹ It is proper to raise questions of title under the plea of not guilty.⁶² The intervention of one day between the verification of the complaint and the issuing of the summons will not invalidate the proceedings.⁶³ The return day must be three entire days after the issuing of the summons.⁶⁴ The statute provides that either party feeling himself aggrieved may appeal from the judgment of the commissioner or justice to the Circuit court upon the execution of an appeal bond in a penalty to be fixed by the officer taking the same, which must not be less than double the amount of the annual rental value of the premises.⁶⁵

§ 161. Substituted Service.—By statute ⁶⁶ it is provided that if the defendant cannot be found, service of summons may be made by leaving such copy at the usual place of abode of such defendant in the presence of some person of suitable age who shall be informed as to its contents. This statute being in derogation of the common law is strictly construed and the officer must, if he finds anyone on the premises or in charge thereof, inform such person of the contents of the writ. Failure to do so will render it nugatory.⁶⁷

Where substituted service is had, the party defendant is entitled to two full days' notice to prepare for the day of appearance, the same as in case of personal service.⁶⁸

60. *Folkner v. Beers*, 2 Doug. p. 117.

61. *Fowler v. Breedan*, 98 Mich. p. 133.

62. *Butler v. Bertrand*, 97 Mich. p. 50.

63. *Grueler v. McRoberts*, 48 Mich. p. 316.

64. *Dolee v. Ireland*, 9 Mich. p. 157.

65. *Compiled Laws 1915*, 13252.

66. "The officer to whom such summons shall be delivered shall serve the same at least two days

before the time of appearance mentioned therein, by delivering to the defendant, if to be found within the county, a copy thereof, but if the defendant shall not be found it shall be served by leaving such copy at the usual place of abode of such defendant, in the presence of some person of suitable age who shall be informed of its contents." Section 13243, *Compiled Laws 1915*.

67. *Knopf v. Herta*, 212 Mich. 622.

68. *Zimmerman v. May*, 208 Mich. 55.

If the defendant does not appear and personal service is not obtained, in land contract cases it is thought to be the better practice not to take or enter a judgment against the defendant until personal service upon him can be had.⁶⁹

§ 162. Steps on Appeal from Circuit Court Commissioner.— Either party conceiving himself aggrieved by the determination or judgment of the Circuit Court Commissioner in a summary proceeding to recover the possession of land where the defendant holds the same contrary to the conditions or covenants of any land contract, may appeal therefrom to the Circuit Court for the same county, within the same time, in the same manner, and the same proceedings had as in cases of appeals from judgments rendered before justices of the peace.⁷⁰

The first step in effecting an appeal is to file an affidavit, a form of which is hereinafter set out, a bond with sufficient sureties to be approved by the justice, and to pay to the justice the taxable costs of the prevailing party together with his fees for making out the return on said appeal, and further sum of \$3.00 to be paid to the clerk of the court, which sum shall be paid to the clerk of the court by the commissioner at the time the return on appeal is filed with the county clerk.⁷¹

69. Davis Michigan Practice Before Circuit Court Commissioners, Section 133.

70. Three Comp. Laws Mich. 1915, Sec. 13252.

71. "Either party conceiving himself aggrieved by the determination or judgment of the commissioner, or other officer, made or rendered under the provisions of this chapter, may appeal therefrom to the circuit court for the same county, within the same time, in the same manner, and return may be compelled, and the same proceedings shall be thereon had, as near as may be, and with like effect, as in cases of appeals from judgments rendered before justices of the peace, and costs shall be awarded and collected in the circuit

court in the same manner; and if such appeal is taken by the defendant the appeal bond shall be in a penalty to be fixed by the officer taking the same, not less than double the amount of the annual rental value of the premises in dispute, to be determined by the commissioner, and shall be executed by two or more sufficient sureties, and shall also in addition to the usual conditions of an appeal bond contain a further condition, that if the plaintiff obtain restitution of said premiums in said suit, the said defendant will forthwith pay all rent due or to become due the plaintiff for the premises described in the complaint, or the rental value thereof, up to the time said plaintiff shall obtain possession thereof,

Upon payment of the foregoing fees and the filing of said affidavit and bond, the commissioner usually prepares the return on appeal in his own office. An appeal must be perfected within five days after judgment is rendered,⁷² but the time for such appeal may be extended by the Circuit Court on good cause shown.⁷³

The amendment of 1917,⁷⁴ providing that no writ of restitution shall issue until the expiration of thirty days after the entry of judgment of restitution in proceedings upon a land contract has been held not to extend the time within which an appeal might be taken from five to thirty days.⁷⁵

The affidavit for appeal, the common form of affidavits on appeal from justices' courts is sufficient.⁷⁶

§ 163. Form of Affidavit on Appeal.—The affidavit of appeal should contain the following essential averments:

1. It should name the commissioner before whom the proceedings were had.

2. It should name the parties, the date of the judgment, the premises involved, and the amount of costs taxed, and should conclude with an averment that the judgment rendered is not in accordance with the just rights of the deponent as he verily believes, and that the deponent conceives himself aggrieved thereby, and appeals therefrom to the Circuit Court for the county in which the proceedings are pending.

3. The affidavit should be duly verified.

The following form has been approved:

State of Michigan, }
County of } ss.

John Doe, of said county, being duly sworn, says that a final judgment was rendered upon an issue of fact and law,

together with costs of suit in prosecuting said complaint and obtaining restitution of said premises, and if the plaintiff obtain restitution of said premises, he may, at his election, sue and recover on said bond, or bring his action against the defendant, under section twenty-three of this chapter. 3 Compiled Laws Mich. 1915, Sec. 13252.

72. 3 Comp. Laws Mich. 1915, Sec. 14402.

73. 3 Comp. Laws Mich. 1915, Sec. 14408; *Bearse v. Aldrich*, 40 Mich. 529.

74. Act 243, Pub. Acts 1917.

75. *Feldman v. Zimmerman*, 205 Mich. 240.

76. *Hanaw v. Bailey*, 83 Mich. 27.

joined between the parties by _____, Circuit Court Commissioner in and for said county, on the _____ day of _____, A. D. 19____, in favor of Richard Roe, as plaintiff, and against deponent, John Doe, as defendant, whereby the said John Doe is required to leave and deliver up possession of the following premises: _____ to said Richard Roe and for _____ dollars, costs of suit.

Deponent further says that such judgment is not in accordance with the just rights of said deponent, as deponent verily believes, and that said deponent conceives himself aggrieved thereby, and appeals therefrom to the Circuit Court for the County of _____, and further deponent sayeth not.

John Doe.

Subscribed and sworn to before me this _____ day of _____, A. D. 19____.

Circuit Court Commissioner

§ 164. **Bond On Appeal.**—The statute provides that in addition to the usual conditions of an appeal bond, it must contain a further condition, that if the plaintiff obtains restitution of the premiums in the suit, the defendant will forthwith pay all rent due or to become due the plaintiff for the premises described in the complaint or the rental value thereof up to the time the plaintiff shall obtain possession thereof, together with costs of suit in prosecuting the complaint and obtaining the restitution of the premises.⁷⁷

The following form of bond on appeal has been sustained:

KNOW ALL MEN BY THESE PRESENTS, that we, Richard Roe, as principal, and _____, _____ as sureties, are held and firmly bound unto John Doe in the sum of _____ dollars, to be paid to the said John Doe, or to his certain attorneys, heirs, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves our heirs, executors, and administrators, and each and every one of them, firmly by these presents.

Sealed with our seals and dated the _____ day of _____, 19____.

Whereas, judgment was rendered on the _____ day of _____

77. 3 Compiled Laws 1915, Sec. 13252.

....., by, a Circuit Court Commissioner of the County of, and State of Michigan, in favor of the said John Doe, plaintiff, for the restitution of the following lands and tenements, to-wit:, and for the sum of dollars, costs of suit, against the said Richard Roe, as defendant.

And whereas, the said Richard Roe, conceiving himself aggrieved by the said judgment, has appealed to the Circuit Court for the County of

Now, the condition of this obligation is such that if the said Richard Roe shall prosecute his appeal with all due diligence to a decision in the said Circuit Court, and he shall abide by said judgment, and pay the amount of the same. including all costs with interest thereon, together with the amount of rent found due the plaintiff for said premises with interest, and, in case the said appeal shall be discontinued, if the said shall pay the amount of the judgment rendered against him before said commissioner, including all costs, with interest thereon, together with the rent due upon said premises up to and including the date of the dismissal of said appeal, with interest thereon, then this obligaiton shall be void, otherwise to remain in full force and effect.

Richard Roe (Seal)
..... (Seal)
..... (Seal)

The bond may be approved by a deputy county clerk.⁷⁸

The jurisdiction of the Circuit Court on appeal is no greater than the commissioner's.⁷⁹

The discretion of the Circuit Court to allow costs, including certain fees, in these appeals, cannot be overcome by rule of court not to allow them in certain cases.⁸⁰

The judgment of the Circuit Court can be reviewed by writ of error only.⁸¹

The remedies of appeal and certiorari to the Circuit Court are adequate and complete and the Supreme Court, while it

78. Cole v. Judge, 106, Mich. 692. Mich. 356; Peters v. Fisher, 50 Mich. 331.
79. Mulder v. Carlett, 54 Mich.
80. 81. Parker v. Copeland, 4 Mich 528.
80. Brewing Co. v. Judge, 108

may have the power, is clearly not bound to review a commissioner's judgment upon a common law certiorari.⁸²

A reversal on certiorari does not secure a new trial, but ends the proceedings; on appeal a new trial is of right.⁸³

§ 165. Return On Appeal.—It is the duty of the commissioner after having prepared the return on appeal, to duly file the same with the Clerk of the Circuit Court, and when such return has been filed, the Circuit Court shall be possessed of the cause, the same as if it had originally been commenced in that court.⁸⁴

The following form of return may be used on appeal:

(Caption.)

Before, Circuit Court Commissioner for the County of

An appeal having been made in the above cause: I, ..., commissioner before whom the above cause was tried, do hereby return to the Circuit Court for the County of, the proceedings had before me therein as follows:

The plaintiff prosecuted said action by his attorney, John Doe, and defendant appeared by his attorney, Richard Roe. (If parties prosecuted in their individual capacity, so state.)

This cause was commenced by summons issued on the day of, A. D. 19..., returnable at my office in the of in said county of on the day of aforesaid at o'clock in the noon.

The following is the substance of the complaint: (here insert copy of the complaint).

The defendant's plea was as follows: (here state the defendant's plea, if in writing, set out verbatim).

Said cause was by agreement of the parties, tried by the court (if tried by a jury, here state, and also the verdict of the jury).

That on the day of, A. D. 19..., I rendered judgment against the defendant for the restitution

82. *Smith v. Reed*, 24 Mich. 240;
Farrell v. Taylor, 12 Mich. 113.

84. 3 Compiled Laws 1915, Section 14417.

83. *Knapp v. Gambsy*, 47 Mich. 377.

of the premises described in said complaint, and for \$..... costs.

As to the matters and alleged errors stated and set forth in the affidavit filed to appeal said cause, hereto annexed, I do further return (here set forth the facts relating to the alleged errors) and I do further return that the affidavit and bond herewith returned were delivered to me on the day of....., and the cost of suit and my fees were at the same time paid.

Given under my hand and seal day of A. D. 19....

.....
Circuit Court Commissioner for
..... County, Michigan.

§ 166. Effect of Final Judgment in Possessory Proceedings.
—Where the vendor elects to pursue his remedy before a Circuit Court Commissioner for possession of the property, and the vendee fails to pay the amount found to be due on the contract by the commissioner within 30 days as provided by the statute,⁸⁵ in the absence of fraud, mistake, or any appeal, the judgment of the commissioner becomes final and equity will not entertain a bill either for specific performance or to redeem from the forfeiture.⁸⁶

It would further seem that if an appeal is taken to the Circuit Court from the judgment of the commissioner, the vendee will have thirty days from the determination of such appeal

85. Public Acts 243, 1917. Giving vendee 30 days in which to pay the judgment.

86. Security Investment Co. v. Meister, 214 Mich. 338.

Said the court in the above entitled case:

“Regular proceedings were had under the statute before the Circuit Court Commissioner and judgment of restitution was rendered by him, and amount then due was fixed. The time given defendant under the statute after judgment in which to redeem expired without payment of the amount so fixed. There is no accident, fraud, or mistake alleged. Under these circumstances the judgment rendered in a case where the commissioner had jurisdiction is a finality and neither it nor the evidence upon which it is based may be reviewed by a court of equity.”

to pay the amount found due in the Circuit Court on the contract.⁸⁷

§ 167. Effect of Registration of Writ of Restitution.—Where the vendee under a land contract places the same on record and fails to abide by the terms and conditions of the contract, the vendor, after a forfeiture under the statute, is permitted to place the writ of restitution on record and thus give notice to all persons of the termination of all rights of defendants in or to the lands or tenements in question.⁸⁸

Where the defendant has allowed a judgment of restitution to be entered against him before a circuit court commissioner as is provided in the above statute, he cannot ask to have the facts and law upon which it is based reviewed in a court of equity.⁸⁹

§ 168. Proceedings to Have Forfeiture Decreed.—A court of equity abhors forfeitures and will on some occasions relieve from them.⁹⁰

Where a forfeiture has been legally effected it is possible for a party to go into a court of equity and by appropriate pleadings set up the fact that a forfeiture has been legally effected between the parties and ask for a decree and pray for relief, decreeing the legality of such forfeiture and quieting the title against the defendant.⁹¹

This course seems to be necessary or desirable only in case where the vendor has declared a forfeiture and has obtained the possession of the premises without resort to either foreclosure proceedings or summary proceedings under the statute, as in event the former action were taken the record would be notice to all parties that the rights of the vendee in the contract had been determined and in the latter case a registration of the writ of restitution as provided by the statute⁹² would have like effect.

87. *Smith v. Nelson*, 165 Mich. 438. Holding that vendee had five days from date of final judgment in the Circuit Court.

88. Pub. Acts Mich. 1917, No. 343.

89. *Security Investment Co. v. Meister*, 114 Mich. 344.

90. See Sec. 171-184 Post.

91. *Security Investment Co.*, supra.

92. Pub. Acts, 1917, No. 243.

§ 169. Bill of Complaint—Form to Have Forfeiture Legally Established.

STATE OF MICHIGAN

In the Circuit Court for the County of
In Chancery

John Doe,
Plaintiff, }
vs. }
Richard Roe,
Defendant, }

To the Circuit Court for the County of

John Doe, of the City of....., County of.....,
and State of Michigan, plaintiff herein, complains of Richard
Roe, defendant herein and respectfully shows unto this Hon-
orable Court:

I. That he now is and for a long time prior hereto, has
been the owner in his own right, in fee simple of all that cer-
tain piece or parcel of land situated in the City of
in said county, and State of Michigan, described
as follows: (here insert description as in the contract), of the
value of dollars, and as such owner did on the
..... day of, 19...., enter into an agreement
to sell the same to Richard Roe, the defendant herein, for the
sum of dollars, to be paid as follows:
And the said defendant did covenant and agree to pay said
sum above mentioned, and to pay said sums with interest
thereon at the time set forth in said contract, a true copy of
which is hereto attached, marked "Exhibit A" and made a
part of this bill of complaint, and also agreed to pay and satisfy
all taxes and assessments of every nature that should by any
lawful authority be levied or assessed upon said land, until the
whole of said purchase money, as well as interest and prin-
cipal should be fully paid.

II. That in consideration of the premises the plaintiff, did
in said land contract, covenant and agree that upon the full
payment of the said purchase money in the manner aforesaid,
and upon the full performance by the said defendant of the
said covenants and agreement on his part to be kept and per-
formed, this plaintiff, would by a good and sufficient deed of

conveyance, grant and convey the said above described land belonging to the said plaintiff, to the said defendant, his heirs, and assigns, forever, in fee simple.

III. That by the terms of said land contract, the defendant might take possession of said premises and continue in the actual occupation thereof so long as he should perform his part of the covenants and agreements in said contract contained, and that if the said defendant should fail to perform his part of the covenants and agreements, or any part thereof, then this plaintiff might and should have the right to declare the said contract null and void and to retain all sums of money that might have been paid on said premises and might and should have the right to take immediate possession of the said premises.

IV. That the said defendant has made default in the performance of his part of the covenants and agreements in the said land contract, and has not paid to this plaintiff the installment of the purchase money which fell due on the..... day of, A. D. 19.... (state breaches in full), although the time for the payment of such installment has long since elapsed and that there is now due and unpaid to this plaintiff on said contract for principal and interest, the sum of dollars.

V. That the said defendant has also made default in the payment of taxes lawfully levied on said premises and has failed to pay the taxes for the year 19....., although the time limit by law for the payment thereof has long since elapsed and this plaintiff, for his own protection, has been compelled to pay and has paid such taxes amounting to the sum of dollars, on or about the.....day of..... 19.....; and that the said defendant is equitably indebted to this plaintiff in said sum with interest from said last mentioned date.

VI. That on the.....day of.....A. D. 19....., plaintiff duly served on the defendant a notice of forfeiture, declaring said contract duly and legally forfeited and the contractual relations between the plaintiff and defendant duly terminated and severed; that on the.....day of..... A. D. 19....., plaintiff duly made a demand on the defendant

for the surrender to the plaintiff of possession of said premises; that thereupon said defendant forthwith surrendered to the plaintiff possession of said premises and that plaintiff has been in possession of said premises ever since, and that the forfeiture of said contract is legal and complete.

Wherefore plaintiff prays as follows:

1. That a decree may be entered in this cause, decreeing that said contract heretofore existing between the plaintiff and defendant covering the above described real estate has been legally forfeited and terminated by this plaintiff and that the plaintiff is the sole owner of said property, free from any and all claims of the defendant growing out of said contract.

2. That this plaintiff may have such further, other or different relief as shall be agreeable to equity and good conscience.

And this plaintiff will ever pray, etc.

Plaintiff.

Attorney for Plaintiff.

§ 170. Decree, Form of Declaring Forfeiture Effected.

STATE OF MICHIGAN

In the Circuit Court for the County of -----
In Chancery

John Doe,)
Plaintiff,)
vs.)
Richard Roe,)
Defendant.)

At a session of said court held in the court house in the City of -----, on the ----- day of -----, A. D. 19....

Present: Honorable-----

Circuit Judge.

This cause having come on to be heard upon the bill of complaint taken as confessed by the said defendant (or upon pleadings and proofs taken in open court, as the case may be), and thereupon, it appearing to the court now here by competent evidence, that the plaintiff in this cause had, prior to

the institution of suit, legally effected a forfeiture of the contract set up and described in plaintiff's Bill of Complaint, and that such forfeiture had been fully effected prior to the institution of said suit, and that the interest of said defendant had been terminated therein and that plaintiff had taken possession of said property.

It is therefore Ordered, Adjudged and Decreed and this court by virtue of the authority therein vested, doth Order, Adjudge and Decree that said contract (here describe the contract) covering the following described real estate (here insert description of real estate) has been duly and legally forfeited by plaintiff prior to the institution of this action and that the defendant has no right, title or interest, either legal or equitable in said property.

Circuit Judge.

CHAPTER X

FORFEITURE WHEN SUSTAINED, WHEN RELIEF FROM GRANTED ILLUSTRATIVE CASES, PLEADING, PRACTICE AND FORMS

- § 171. Relief From Forfeiture, When Granted—General Principles.
- § 172. Forfeiture of Contract for Violation of Nonassignment Clause.
- § 173. Same Subject Continued.
- § 174. Forfeiture Not Sustained. Illustrative Cases.
- § 175. Relief From Forfeiture Granted. Illustrative Cases.
- § 176. Examples of Relief From Forfeiture Granted.
- § 177. Relief From Forfeiture Granted. Illustrative Cases.
- § 178. Relief From Forfeiture Granted. Illustrative Cases.
- § 179. Forfeiture Sustained. Illustrative Cases.
- § 180. Forfeiture Sustained. Illustrative Cases.
- § 181. Forfeiture Sustained. Illustrative Cases.
- § 182. Forfeiture Sustained. Illustrative Cases.
- § 183. Relief From Forfeiture Necessity of Tender.
- § 184. Relief From Forfeiture After Final Judgment by Circuit Court Commissioner.
- § 185. Relief From Forfeiture, Bill of Complaint, Form of, Including Averments for Specific Performance and Injunctive Relief.
- § 185A. Pleadings and Briefs in Late Michigan Cases Involving Relief From Forfeiture.

§ 171. Relief From Forfeiture, When Granted—General Principles.—It is difficult to formulate any hard and fast rules which control courts of equity in granting relief from forfeiture in land contract cases, as the courts do not seem to be moved so much by any general principles of equity jurisprudence as by the equities of the particular case before the court. Generally speaking, it may be said that where the forfeiture of the land contract would result in a substantial loss to the vendee and the vendor's position has not materially changed by reason of or since the forfeiture of the contract and the vendee's laches are not particularly great, the vendee will be granted relief from the forfeiture if he pays into court all arrearages on the contract together with interest thereon. Thus where a vendee had been in arrears under a land contract which provided for a forfeiture upon nonpayment for a period of one year or more, and had never tendered or offered to pay the sum called for by the contract, the

court in order to prevent serious loss to the vendee permitted him to redeem from the forfeiture¹ where there was litigation concerning a title and the plaintiff did not keep up the payments during the time the litigation was in progress, the court likewise permitted the vendee to redeem from a forfeiture of the contract.² Where the plaintiff paid only a portion of the purchase price but remained in possession of the property and made valuable improvements for eleven years, and paid the taxes, the court permitted the defendant to be relieved from the forfeiture upon condition that he would pay the entire purchase price, the costs of the action plus fifty dollars.³ Where the plaintiff became in arrears on a land contract which contained a clause permitting the contract to be forfeited for nonpayment, and providing that time should be the very essence of the contract, the court permitted the defendant to redeem from the forfeiture and used the following language:

"The fact that complainant's rights under the contract were subject to forfeiture at law, and the defendant's entry was lawful does not finally determine the rights of the parties. It is the province of the court of equity to grant relief in just such cases."⁴

In another case the court used as its criterion for granting relief from the forfeiture that it would be unjust and oppressive to allow the forfeiture to stand and would work no injustice to the defendant to permit a redemption.⁵

In another case where the vendee assigned a contract which contained a provision permitting the forfeiture thereof, upon assignment the court relieved the vendee from the forfeiture in this case upon the principle that the covenant against the assignment was for the purpose of permitting the vendor to choose his own tenant and that this object was not interfered with in this case.⁶ On the other hand, the courts have in a

1. *Lozon v. McKay*, 203 Mich. 364.

4. *John v. McNeal*, 167 Mich. 148.

2. *Bugaski v. Sinka*, 200 Mich. 418.

5. *Stickney v. Parmenter*, 35 Mich. 237.

3. *Cornell v. Norton*, 188 Mich. 187.

6. *McDonald v. Andrews*, 199 Mich. 161.

number of instances⁷ sustained a forfeiture of contracts where the equity of the vendee in the contract is not substantial and to permit the forfeiture did not shock the sense of justice. As previously stated, however, the practitioner will find the statement of general principles of very little value in relation to cases of this character and will find it necessary to examine the adjudicated cases in order to determine what facts have moved the court to withhold or grant relief from forfeiture, and for that reason there has been added to this chapter a collection of substantially all the cases involving forfeiture which have ever been decided by the Michigan Supreme Court. See Secs. 174 to 182.

§ 172. Forfeiture of Contract for Violation of Nonassignment Clause.—Land contracts in general use throughout the state usually contain a provision that the vendee shall not assign the contract without the written consent of the vendor endorsed upon the contract. In some cases such clauses con-

7. *Towar v. Detroit Trust Company*, 19 Mich. p. 670. Where the court sustained a forfeiture of a contract of purchase, the amount paid down being \$1000.00 on a purchase price of \$9700.00 and the vendee company was in the hands of a receiver.

Donnelly v. Lyons, 173 Mich. 515. Where the sum of \$1040.00 has been paid on the purchase price of a property and the vendee was greatly in arrears on his payments and the property and increased very much in value.

Mills v. Wm. Drueke Co. 172 Mich. 394. In this case the vendee under a land contract had paid in to the vendor a substantial amount of money under the contract. Upon default the vendor after negotiation extending over several weeks endeavoring to secure the money due, summary proceedings were taken against the vendee and the vendor obtained posses-

sion. After a lapse of about a year during which time the vendee by reason of having violated the criminal law, was unable to carry out his contract with the vendor to handle the vendor's beer, the vendee brought action for redemption of the property. The lower court permitted the redemption upon the payment of a certain sum of money. The supreme court set aside the decree of the lower court and dismissed the bill of complaint, upholding the forfeiture of the land contract.

See also the following cases where forfeiture has been sustained. *Murphy v. McIntyre*, 152 Mich. 591; *Jones v. Bowling*, 117 Mich. 288; *Satterlee v. Cronkhite*, 114 Mich. 634; *Lowrie v. Gourlay*, 112 Mich. 641; *Truesdall v. Ward*, 24 Mich. 116; *Welling v. Stickland*, 161 Mich. 235; *Scott v. Sullivan*, 159 Mich. 297.

tain a provision that neither the contract or any rights thereunder shall be assigned without the written consent of the vendor on the contract. As such contracts usually contain a provision permitting a forfeiture of the contract for a violation of its terms on the part of the vendee, the question is frequently presented to the profession, "Will such clauses prohibiting assignment be upheld by the courts?" Unfortunately the law in its present development will not permit this question to be answered authoritatively. In Michigan the question has never been squarely before the court and the decisions of other states are in conflict.

Where this question has been presented to the courts they usually find some other ground upon which to decide the case, such as waiver, oral consent or estoppel. From the Michigan decisions as they now stand, the following rules are deducible.

(a) If the vendor gives a verbal consent to the assignment he is thereby estopped from forfeiting the contract for that cause.⁸

(b) If the vendor accepts payments from the assignee of the vendee, he thereby waives the right to declare the contract forfeited.⁹

(c) If the vendor begins an action to foreclose the land contract either against the vendee or his assigns, he thereby waives any previous forfeiture.¹⁰

(d) Where the assignment is not accompanied by a change of possession or ownership but is made only for the purpose of placing the contract on record, the assignment clause is not violated.¹¹

(e) As to leases, it has been held that the relation between the landlord and tenant is of a personal nature and the courts have therefore upheld the forfeiture upon the violation of the nonassignment clause in the lease.¹²

8. *Old Second Hall Bank v. Savings Bank*, 115 Mich. 533; *Moday v. Roth*, 150 Mich. 290; *John v. McNeal*, 167-151. *Bugajski v. Swiko*, 200 Mich. 415.

9. See citations in note 8, *supra*.

10. See citations in note 8, *supra*.

11. *MacDonald v. Andrews*, 199 Mich. 161.

12. *Lewis v. Sheldon*, 103 Mich.; *Fray v. Austin Machinery Company*, 140 Mich. 452. *Randall v. Chubb*, 46 Mich. 311. Plaintiff seeks to recover possession by summary proceedings. Plaintiff leased to one

(f) If the vendor leads the vendee to believe that he will not object to the assignment, he would of course, be thereby estopped from the forfeiture of the contract, under the general principles of the law of estoppel.

(g) In short if the vendor does anything indicating that he relies upon the existence of the contract after default in its conditions by the vendee, the court will refuse to sustain a forfeiture of the contract.

(h) The forfeiture clause in a contract is strictly construed and unless the act done by the vendee is brought squarely within its terms, a forfeiture will not be sustained.¹³

Stoddard, a farm on which Stoddard was to do all the work and care for the tools, repairing them at his expense. Stoddard attempted to assign this lease to Randall, the plaintiff in error. Held: Lease personal and not assignable without consent of lessor. The amount of product would depend to a great extent upon the personal skill of the husbandman and an attempt to deprive landlord of right to select him forfeits the lease. Plaintiff given immediate possession. Note: No express covenant. Clear personal relation in lease.

Marvin v. Hartz, 130 Mich. 26. Plaintiff seeks by summary proceedings to regain possession of premises. Plaintiff leased premises, lease containing covenant by lessee not to sublet or assign any part of premises without written consent of lessor. Lease was assigned to defendant without consent of plaintiff. Held: The clause in the lease which provided for forfeiture when the clause in regard to assignment should be violated may be strictly enforced. Plaintiff may obtain possession. Note: This a lease with express covenant.

Contracts Without Restrictive Clauses Against Assignment Are Transferable.

13. A vendee under an executory contract for the purchase of land, obtains, by virtue of his contract, such an interest therein, as enables him, prior to a full performance on his part, to assign same, and his assignee on the payment of the unpaid balance of the purchase money may require the vendor to make a conveyance to him thereof. *Lenman v. Jones*, 222 U. S. 51, 56 L. Ed. 89; *Simmon v. Zimmerman*, 144 Cal. 256, 79 Pac. 451, 1 Anno. Cases 850; *Robinson & Perry*, 21 Ga. 183, 68 Anno. Dec. 455; *Cowart v. Singletary*, 79 S. E. 196, 140 Anno. 435, 47 L. Ra. (N. S.) 621; *More v. Gariglietti*, 87 N. E. 826, 228 Ill. 143, 10 Anno. Cases 560; *Churchill v. Morse* 23 Iowa 229, 92 Anno. Dec. 560; *McGreggor v. Putney*, 75 N. H. 113, 71 Atl. 226; Anno. Cases 1912 A 193.

Clauses against the assignment of land contracts will be strictly construed and subletting the premises does not constitute such an assignment. *Joy v. Stevenson*, 128 Pac. 751; Am. & Eng. Enc. Law, 2d Ed., p. 659-680.

If the vendor has been guilty of any breaches of the contract a forfeiture thereof will not be sustained, as he who commits the first substantial breach of the contract is thereby estopped from enforcing the contract, if the other party thereto desires to rely on such breach.¹⁴

None of the Michigan decisions decide the question squarely as to what the courts will do with the nonassignment clause of a land contract where there is no question of waiver, oral consent or estoppel involved in the assignment, and in other states there is a decided conflict in the authorities, some courts holding such clauses void as against public policy because of being a restraint on the alienation of real property.¹⁵ Others

14. *Jones v. Berkey*, 181 Mich. 476.

Clauses Against Assignment Held Void as Against Public Policy.

15. *Griggs v. Landis*, 21 N. J. E. O. 495. This was a bill for specific performance filed by an assignee of the vendee, to compel the conveyance of property sold under a land contract, which contained a covenant providing that the vendee should not have the right to assign the contract before certain improvements were installed in the premises which the vendee had contracted to install. The vendee assigned such contract before all the improvements were completed but his assignee completed same, but not strictly within the time prescribed in the contract. Held: Clause against nonassignment of the contract void as against public policy.

Said the court further in *Griggs v. Landis*: "But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assign is not the main purpose of the covenant, but

a mere incident to and security for such purpose. It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect," and again, "That the restriction is in the nature of a mere security for the performance of the principal covenants, and such relief may be given by a court of equity as shall appear to be equitable under the circumstances of each particular case," and again, the court goes a step further in what is indirectly a repudiation of such a restriction, when it says: "Penalties, forfeitures and re-entries for conditions broken are not favored in equity, and constitute a large branch of equitable relief. Usually, they are held to be securities for the payment of money, and the performance of conditions, and where compensations can be made for nonpayment and nonperformance, equity will relieve against the rigid enforcement of the contract. This is upon the general principle that a court of equity is a court of conscience, and will permit nothing to

be done within its jurisdiction which is unconscionable."

Johnson v. Eklund, 72 Minn. 195, court said: There is nothing personal in the nature of the contract. All that the vendor was interested in was the payment of the purchase money at maturity. If he received this, it was wholly immaterial to him who paid the money or who got the land. "At most this stipulation against an assignment is merely collateral to the main purpose of the contract designed as a means of securing and enforcing performance of what was undertaken by the vendee, to-wit, the prompt payment of the purchase money. When the vendor has received all his purchase money, he has received all that he is entitled to, and all that the provision against an assignment was intended to secure.

A transfer made in due course of the administration of the estate of the vendee to raise money to pay the expenses of administration is not a violation of a provision prohibiting assignment without the consent of the vendor. *Avile v. Pereira*, 120 Cal. 589, 52 Pac. 840.

Cheney v. Bilby, 74 Fed. 52. The court said: "This provision of the contract was obviously intended to prevent the assignment of the same, while it was executory to persons who might not be able or well disposed to faithfully execute it. It was a provision which was inserted in the agreement to enable Cheney, the vendor, to control the selection of an assignee thereof, so long as the agreement remained in part unperformed, or so long as he was interested in the choice of an assignee who had the requisite means and ability to do what

remained to be done. Inasmuch, then, as the provision in question was only intended to secure the faithful performance of the agreement by the purchaser or his assignee, it would be both unreasonable and inequitable to hold that Cheney, the vendor, is privileged to take advantage of the provision, to avoid performance on his part, after the entire amount of the purchase money has been promptly paid or tendered. We must assume whatever may be the fact in this regard, that the provision against assigning the contract without the vendor's consent was inserted therein for an honest and legitimate purpose; that is to say, for the purpose of securing the punctual payment of the purchase money, and a full compliance with other executory agreements, either by the original purchaser or by his assignee. Therefore, when it appears that that object has been accomplished, that the purchase money has been promptly paid or tendered, nothing remained to be done but to execute a deed to the purchaser, the vendor cannot be heard to allege as an excuse for not making a conveyance, that at a certain time the purchaser of the land assigned the contract of purchase without his consent. It would be trifling with justice to tolerate a defense of that character after the purchaser's engagements have each been performed in the time and manner stipulated in the contract of sale." Some of the cases, however, not only recognize the validity of the stipulation but insist on a literal enforcement thereof and hold that an assignee of the vendee, in the absence of acts or circumstances,

holding and perhaps by the weight of authority that such a clause is valid on the theory the parties have the right to enter into such a contract if they so desire.¹⁶

constituting an estoppel or waiver, acquires no rights which he can enforce against the vendor. *Hunter Tract Imp. Co. v. Stone*, 58 Wash. 661.

It has been held that an assignment as collateral security of a contract for the sale of land, by the vendee, does not violate a stipulation in the contract prohibiting assignment. *Badger Lbr. Co. v. Parker*, 85 Kan. 134, 116 Pac. 242, 35 L. R. A. (N. S.) 901.

Clauses Against Assignment of Contract Upheld by the Court

16. *Lockerby v. Amon, et al.*, 64 Wash. 24. The court said: "It is not denied that stipulations of the character relied on in this case are lawful and binding upon the parties. *Hunter Tract Imp. Co. v. Stone*, 58 Wash. 661, 109 Pac. 112. However, an engaging argument is made by appellant upon the theory that, although the parties had a right to so contract, the restrictive clause has performed its office, that is, it being designed only to insure payment of the purchase price, and that being tendered, there can be no reason for withholding the deed; and generally that, inasmuch as Swingle might have tendered and received a deed, and thereafter immediately conveyed to Johnson, equity, inasmuch as it regards substance rather than form, will compel the execution of a deed to the assignee. These arguments are not new and find some support in the authorities; but they have been rejected by a

majority of the courts." (The court evidently refers to the validity of the restriction in contracts generally). "The privilege of selecting a grantee is an incident of ownership, and we cannot presume, as did the Supreme Court of Minnesota, that 'at most this stipulation against an assignment is merely collateral to the main purpose of the contract, designed as a means of securing and enforcing payment of what was undertaken by the vendor, to-wit: the prompt payment of the purchase money. When the vendor has received all his purchase-money, he has received all he is entitled to, and all that the provision against the assignment was intended to secure.' *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14.

"While this reasoning is entitled to consideration we cannot accept it as the end of the law. A vendor may have confidence that his vendee will not use the property to his disadvantage. It is his privilege to decline to deal with strangers, or, he may, by limiting the right of assignment, save any question as to the interest of intervening third parties, a result not altogether unlikely under our community property system. Or he may be unwilling to assume to pass upon the legal sufficiency of an assignment. The better rule is stated in *Omaha v. Standard Oil Company*, 55 Neb. 337, 75 N. W. 859. See also, *Monographic Notes*, 88 Am. State Rep. 201; *Muel-*

In examining the decisions appended in the note, it should not be overlooked that some states, like Indiana, have adopted the doctrine permitting a strict forfeiture of land contracts without any relief by way of redemption regardless of what the vendee may have paid under the contract. Such decisions are of doubtful authority in Michigan where the courts have gone

ler v. Northwestern University, 195 Ill. 236, 63 N. E. 110, 4 Cyc. 20.

"Whatever may have been the reasons for reserving the right to decline to deal with an assignee, such reservation contravenes no rule of public policy, and is enforceable."

In *Martin v. Smith*, 94 Ore. 132, the contract therein passed upon provided as a condition that: "He will not assign or transfer this contract, nor deliver the possession of said premises to any person or persons whomsoever without the consent in writing of the said first party." The defeasance clause also states, "or in case the said party of the second part shall fail or refuse to comply with all or any of the conditions, or agreements herein contained and by him to be performed, then and in such event this contract shall be void and thereupon said first party shall be entitled to the immediate possession of said premises." All payments were to be forfeited in case of such default and considered as rent for the use of the premises. The court said: "A contract may be defined to be an agreement between two or more parties competent to contract, upon a sufficient consideration, to do or not to do a particular thing which lawfully may be done or omitted. Hence the parties could provide that the contract should not be assigned without the written consent

of one of them. There is nothing unlawful or contrary to public policy in such a stipulation and under proper conditions the same may be enforced. There are instances where the personal qualities of one of the parties form an element of the agreement, as where the personal services of a physician or of an actor, or a tenant for a certain share of crops as rent, are involved. There by operation of law the contract is not assignable without the consent of the employer. It is equally permissible for the parties to append the same condition by express contract, so that the inhibition against assignment arises from their covenant rather than by operation of law. For instance, in *Behrens v. Cloudy*, 50 Wash. 400, 97 Pac. 450, a lease contained covenants of the lessor to sell the land to the lessee in eight months at the latter's option, and also the covenant of the lessee not to assign any part of the lease. The plaintiff had taken an assignment of the option without a written consent as required by the contract, and sued to compel specific performance. The court held that the covenant against the assignment was lawful and that the purchaser without written consent acquired no rights. In another Washington case, *Bond-Foster Lumber Co. v. Northern Pac. R. R. Co.*, 53 Wash. 302, 101 Pac. 877, it is laid down as a rule that: 'One who ac-

so far in relieving the vendee from forfeiture in cases where the equities are strongly in his favor. Additional discussion as to the soundness of these conflicting doctrines may be found in the following section.

§ 173. *Same Subject Continued.*—Those courts which have sustained the validity of these nonassignment clauses have usually based their decisions upon one or more of the following reasons:

1. That the parties to a contract have the right to make any contract they desire, so long as such contract is not against public policy; that nonassignment clauses of the character under consideration here violate no principle of public policy.

2. That the vendor ought to have the right to select his vendee, as one vendee might be more desirable than another by reason of his financial situation, punctuality or ability to perform and carry out the agreement.

In considering the main question involved in this discussion, it is well to bear in mind that the following legal propositions have been settled in this state:

cepts assignment of a contract which by express terms is made nonassignable acquires only a cause of action against the assignor.' See also, *Burck v. Taylor*, 152 U. S. 634, 38 Law Ed. 578; see also, *Roses U. S. Notes*; *Tabler v. Sheffield Land Co.*, 79 Ala. 377, 58 Am. Rep. 593; *Deffenbaugh v. Foster*, 40 Ind. 382; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173; *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859; *Zetterlund v. Texas L. & C. Co.*, 55 Neb. 355, 75 N. W. 860."

In the instance case, however, the court decided in favor of the defendant, holding there had been a waiver of the stipulation not to assign. The court saying: "In such contracts as the one we have before us, the provision against assignment without the consent of

the seller is made for his benefit and, like all other provisions in favor of a party, he may waive it if he chooses. Such waiver may be proved by parol and by circumstantial evidence, as well as by direct testimony."

In *Olcott v. Hermans*, 10 New York Supreme Court Rep. 436 (3 Hun. 436), the court said: "The provision in a contract for the sale of land, that it shall become void if assigned without the consent of the vendor in writing, is valid and binding, and the assignment without consent, renders the contract void as against the vendor. But it may be waived and is waived if the vendor with notice of the assignment, accepts the purchase money from the assignee."

The vendee is the equitable owner of the real estate under a land contract, while the interest of the vendor is held to be personal property and his reservation of title is only by way of security, the vendor's interests being so closely analogous to the interest of the mortgagee under a mortgage, that substantially the same procedure is followed in foreclosing both classes of liens.¹⁷ Both mortgagor and vendee are entitled to the possession and beneficial enjoyment of the property. If such nonassignment clause should be upheld as between vendor and vendee, it ought to be upheld between the mortgagor and mortgagee, as the two classes of securities are executed for the same purpose, accomplishing the same result, namely, securing in one instance the payments which may be due and may become due the vendor; the other similar payments to the mortgagee. That such restrictive covenants in mortgages would not be upheld by the courts is too plain for argument.

Apparently the strongest argument advanced in favor of upholding the nonassignment clause in a land contract, is that the vendor has a right to select his vendee by reason of the fact that one vendee may be more desirable than another because of his financial situation, honesty, punctuality or ability to perform and carry out the agreement. This argument, however, falls to the ground when it is considered that in Michigan the assignment of a land contract by the vendee does not release such vendee from his obligation to see that all the terms of such land contract are fulfilled and carried out. Therefore, where the vendee assigns the contract the vendor surrenders no right to proceed against the vendee which he already has.¹⁸ And if anything, his security in the contract

17. Sec. 11 Ante; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Midland County Savings Bank v. Prouty*, 158 Mich. 656; *Harris v. Brown*, 172 Mich. 164.

The interest of vendor is personal property. *Bowen v. Lansing*, 129 Mich. 119-121; *City of Marquette v. Iron Co.*, 132 Mich. 130.

Interest of vendor and vendee is like that of mortgagor and mortgagee and vendor's lien is fore-

closed in much the same manner. *Meigs v. McFarlane*, 72 Mich. 194.

18. Where the vendee assigned the contract with the written consent of the vendor endorsed thereon, the court held that the vendee was not released from the covenants in contract. *Foley v. Dwyer*, 122 Mich. 591; *Wuneman v. Phillips*, 93 Mich. 223; *Barley v. Wells*, 8 Wis. 141, 76 Am. Dec. 233.

is strengthened and enhanced by reason of the fact that he has an additional party interested in the person of the assignee of the vendee in seeing that the payments on the contract are kept up and the terms of such contract fulfilled. If it be argued that the vendor by reason of such clause controls who shall have possession of the premises, the answer is that such nonassignment clause does not prevent the vendee from subletting the premises so that the vendor in any event has no direct control by reason of such nonassignment clauses over the occupancy of the premises, and it should further be noted that apparently it is the view of the Michigan Supreme Court that the vendee in a land contract has such an interest in the real estate as will enable him to sell and convey the same in spite of the nonassignment clause prohibiting the assignment of the contract itself, the court drawing a distinction between a sale of the equitable title to the property held by the vendee and an assignment of the contract itself.¹⁹ It will, therefore, be seen that the nonassignment clause under consideration confers upon the vendor no real protection, but does give him a right which is usually exercised against the vendee contrary to sound principles of public policy.

In those decisions sustaining the forfeiture of contracts for the violation of the nonassignment clause, the question of whether or not such clauses in actual transactions between the vendor and vendee operates against public policy, does not seem to have been examined or raised in the cases considered, the court merely contenting itself with the statement that such clauses were not against public policy, without scrutinizing their actual operation.

In examining this question it should be borne in mind that the restraints against alienation of real property are not favored in law and are generally held to be against public policy if even for a limited time.²⁰ In what way does the restraint in

19. The vendees in a land contract have an equitable interest in real estate and they have the right to sell and convey the same, notwithstanding a provision in their contract that they cannot assign it

without the consent of the vendor. *Coulter v. Lovinger*, 212 Mich. 272.

20. Restraints against the alienation of real property are not favored in law. *Mendelsohn v. McDonald*, 29 Mich. 96.

land contracts under discussion operate against public policy? Public policy has been defined by a well known authority to be "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public."²¹ It has been the observation of the writer that the nonassignment clause is used almost invariably in a manner "injurious to the public," by exacting from the vendee a consideration for permitting the transfer which the vendor has in no wise earned. By reason of such nonassignment clause in the contract, the vendor can and does very frequently say in effect to the vendee, "Pay me a large sum of money or give me a consideration which I have not earned and I will consent to the assignment of the contract." Sometimes this consideration consists of compelling the vendee to pay the entire purchase price, whereas under the contract he was entitled to make his payments my monthly installments over a long period of years, and other times the consideration exacted is a lump sum payment; in other cases increase of the payments are exacted, but whatever the consideration may be it is nothing more or less than a penalty, regardless of name, exacted from the vendee without any real consideration passing to him. The penalties and forfeitures are hateful to the law of Michigan and perhaps more so than to most states, is well known to the profession.²²

Our courts have not hesitated to hold as void against public policy provisions providing for attorney's fees, in notes, in mortgage and penalties of various sorts in contracts and we are constrained to feel that the same principle should be adopted with reference to the clauses under consideration in this section.

§ 174. Forfeiture Not Sustained, Illustrative Cases.—Case of *Lozon v. McKay*, 203 Mich. 365.

Plaintiff and defendant in this case entered into a land contract whereby the plaintiff agreed to purchase said real estate for the sum of \$1850.00, payable \$1050.00 in cash, \$200.00 on April 4, 1916; \$100.00 on April 4, 1917; \$100.00 on April 4.

21. Definition of public policy, 22. See Sec. 145 ante.
33 Cyc. 125.

1918, and \$400.00 on April 4, 1919, together with interest at the rate of six per cent. per annum, and also all taxes and assessments. Plaintiff paid first payment, made improvements on the place, by way of sheds and foundations to the value of \$1300.00 paid one installment of interest in November, 1914, paid the taxes for 1914, 1915, but did not pay them for 1916, and became in arrears on the principal of said contract for more than ninety days to the extent of \$200.00. In July, 1916, the defendant served a notice of forfeiture on the plaintiff. The plaintiff filed a bill for specific performance. The lower court entered a decree dismissing the bill of complaint and upholding the forfeiture.

Upon appeal to the Supreme Court the lower court was reversed, and this notwithstanding the fact that no tender of the amount due on the contract was made before filing suit, nor was the amount due paid in the court; the bill of complaint in this case asked that a decree for specific performance be made but did not ask that the plaintiff be given relief from the forfeiture except by implication. In handing down its decision in this case the court used the following language:

"Treating the bill as amended so as to ask for relief from the forfeiture, and extending to their limits the rules governing the granting of relief in such cases, the decree below may be modified so as to relieve plaintiff from the forfeiture upon condition that within sixty days after the entry of decree in this court they pay to defendant, or to the register of the Circuit Court for the County of Ogemaw, the unpaid purchase price of the land, with all arrearages of interest and any sum paid by defendant for taxes upon the land, with costs of both courts, upon which payment defendant shall execute and deliver a conveyance in accordance with the contract; in default of which payment defendant shall have the relief granted him in the court below with costs of both courts."

§ 175. Relief From Forfeiture Granted, Illustrative Cases.—
Bugaski v. Siwka, 200 Mich. 415.

The plaintiff brought this action to recover damages from the breach of a land contract. Plaintiff was vendee in a contract executed with defendant; as vendee he made certain payments under the terms of the contract but later a question

came up as to the defendant's title to the property. During the pendency of the litigation concerning title the plaintiff did not keep up the payments, the time for payment being orally extended by the defendant. Title was finally held by the court not to be in defendant at all but in a third party. So plaintiff was compelled to give up the premises. The defense to this action is based on the theory that plaintiff had forfeited all his rights under the contract by not keeping up the payments.

The court held that the plaintiff had not forfeited his rights. By the decree of the court the defendant's title was extinguished and plaintiff was excused from tendering payment. Defendant not being in a position to perform, it was unnecessary for plaintiff to tender payment. Plaintiff can recover damages in this case.

Cornell v. Norton, 188 Mich. 187. Plaintiff was vendee under a land contract. He entered into possession and paid the taxes which it was the duty of the vendor to pay. He remained in possession for eleven years and made valuable improvements on the land but never paid any on the purchase price. Defendant after this long length of time declared the contract forfeited for nonpayment and plaintiff brings this action to be relieved against the forfeiture and offering to pay the purchase price now.

The court held that plaintiff would be granted relief against the forfeiture if he would pay the purchase price, the amount of the costs in this suit and also the costs, plus fifty dollars, of the ejectment suit which defendant had brought against him. Plaintiff being allowed to deduct the amount of the taxes he had paid.

John v. McNeal, 167 Mich. 148. Plaintiff filed this bill to compel specific performance of a land contract and to be granted relief from a forfeiture declared by the defendant. Plaintiff purchased certain property from defendant on a land contract. He became delinquent in his payments thereon and plaintiff entered into possession and conveyed the premises to another.

This court held that the plaintiff was entitled to relief in this instance. The fact that plaintiff's rights under the contract were subject to forfeiture at law does not determine the

rights of the parties. It is the province of a court of equity to grant relief in just such cases. It would be oppressive and unjust to forfeit plaintiff's rights under this contract.

§ 176. **Examples of Relief From Forfeiture Granted.**—*McDonald v. Andrews*, 199 Mich. 161. Plaintiff brought a bill for the specific performance of a land contract. The contract was a lease with an option to purchase and plaintiff exercised the option and defendant refused to convey, claiming that the contract had been forfeited because it has been assigned by plaintiff when it contained a clause against assignment.

The court held that the assignment in this case was made merely for the purpose of putting the contract on record and that the sister of the plaintiff who was the assignee did not even know of the assignment. Plaintiff remained in possession all the time. That the purpose of a covenant against assignment is to permit the vendor to choose his own tenant; this object was in no way interfered with by the transaction in this case and when plaintiff offered to pay the contract price for the premises he was entitled to a conveyance.

Maday v. Roth, 160 Mich. 289. Plaintiff filed a bill for specific performance of a land contract. He is assignee of the original vendee under the contract which provided for forfeiture in case of assignment without written consent of vendor. Defendant assented orally to the assignment.

The court held that the parol assent on the part of the vendor to the assignment constituted a valid waiver of the provisions of the contract prohibiting the transfer of the contract without the written consent of the vendor.

Peters v. Canfield, 74 Mich. 498. Plaintiff filed a bill praying for the specific performance of a land contract which he holds as assignee from the original vendee. Defendant contends that the contract had been forfeited by the assignment, since it contained a clause providing for forfeiture in case of sale or assignment unless such assignment should be indorsed on the contract in writing. Complainant contends that there was parol assent to the assignment and defendant denies even parol assent.

The court held that there was sufficient evidence to establish the parol assent which the plaintiff claimed; that by

such parol assent the defendant had waived the provision in the contract that the assignment must be indorsed thereon.

§ 177. Relief From Forfeiture Granted, Illustrative Cases.—*Hickman v. Chaney*, 155 Mich. 217.

Plaintiff is assignee under a land contract and brings this bill to enforce specific performance of the contract. Assignor of plaintiff was in default at the time of the assignment and the contract contained the usual provision that failure to keep up the installments of payments would entitle vendor to declare the contract void. Before purchasing the contract plaintiff made inquiries of the defendant and was informed that if he took over the contract and proceeded to pay the amount of the balance due, the defendant would execute a deed to the premises. This the defendant now refused to do.

The court held that the plaintiff was entitled to specific performance and that the defendant could not now declare the contract forfeited. That although the contract had been declared forfeited by defendant as far as plaintiff's assignor was concerned, their actions in leading plaintiff to believe if he would assume the contract he could complete the payment of the amount still due thereon will be considered a waiver of their right to forfeit the contract as far as the plaintiff is concerned.

Old Second National Bank of Bay City v. Alpena County Savings Bank, 115 Mich. 548. Plaintiff brought a bill to compel the specific performance of a contract to convey certain land. Both plaintiff and defendant acquired their rights through various assignments and conveyances. Plaintiff defaulted in the payment of installments due on the purchase price and defendant declared the contract forfeited. Subsequent to this, however, defendant sought to enforce the contract by bringing an action to collect the purchase price from the defendant by foreclosing the vendor's lien.

Defendant contends that this action cannot be maintained because the plaintiff refused to perform its part of the contract and that its rights under the contract were duly forfeited.

The court held that it was unnecessary to decide whether the failure of the plaintiff to keep up the payments and the

ensuing notice of forfeiture would have been sufficient to work a forfeiture or not; for here the defendant chose to waive the forfeiture by proceedings to enforce the contract and filing the vendor's lien against the property. Subsequent to the default defendant treated the contract as still existing and it cannot now allege that the contract was forfeited.

Corning v. Loomis, 111 Mich. 23. Plaintiff was vendor under executory land contract and brings an action to recover the possession of the premises upon defendant's failure to keep up the payment of installments as due under the contract. No notice was given defendant of plaintiff's intention to declare the contract void.

The court held that mere failure of the vendee to keep up the payments as they became due did not of itself work a forfeiture; that in addition thereto there must be notice given the vendee by the vendor that such failure on his part has terminated the contract.

Hill v. Carter, 101 Mich. 158. Defendant is vendee in a land contract and is in possession of the premises and plaintiff brings this action in ejectment to gain possession thereof, alleging defendant had forfeited contract by not paying the installments as they became due. Defendant alleged offer of payment.

The court held that plaintiff by refusing to accept defendant's offer of payment, even though that offer did consist in an offer to perform certain work which according to the terms of a separate contract was to be taken as payment for the land, had deprived himself of all right to declare a forfeiture for failure to pay according to the terms of the contract.

§ 178. Relief from Forfeiture Granted, Illustrative Cases.—*Robinson v. Traufant*, 97 Mich. 410.

Plaintiff was vendee under an executory land contract and brings this bill to compel specific performance. Defendant alleged that payments were not kept up on the contract and that plaintiff had been served with a notice to quit and that the contract had thereby been forfeited.

The court found that the plaintiff had as a matter of fact become delinquent in payment but that both parties were in tacit agreement not to treat time as of the essence of the

contract and that the matter had run along for many years, the plaintiff keeping up the interest and the defendant being content to regard the matter as an investment. Therefore, upon plaintiff offering to pay the amount of the purchase price she is entitled to specific performance of the contract.

Greenop v. Wilcox and Hyatt, 85 Mich. 49. The real defendant in this case is Wilcox, Hyatt merely being the tenant of Wilcox and in possession of the premises. Defendant is one of two vendees under an executory land contract. He acquired his rights under and assignment from one of the two original vendees. At the time of this said assignment defendant called on plaintiff and told him he was ready at any time to pay his portion of the purchase price and would do so whenever notified. Plaintiff brings this action in ejectment to get possession of the premises, no payments having been made by defendant or his coveegee.

The court held that plaintiff could not declare defendant's rights forfeited under the contract without first notifying him to pay; such notice being a condition precedent to declaring the contract forfeited. And that defendant's rights could not be affected by the acts of the other vendee.

Stickney v. Parmenter, 35 Mich. 237. Plaintiff brings this action for the specific performance of an executory land contract. Defendant is assignee of the original vendor and defends on the ground that the contract had been forfeited by plaintiff taking timber off the land before the amount of the purchase price was paid. Plaintiff alleged an agreement with the assignor of defendant whereby they could remove said timber in order to raise the purchase price. After defendant began proceedings to regain possession plaintiff offered to pay the purchase price.

The court held that there was not sufficient evidence to hold that plaintiff was entitled to remove the timber and that defendant was justified in declaring the contract forfeited; still since the plaintiff without much delay offered and tendered payment of the purchase price and the cost of the proceedings already taken, defendant should have accepted same, and specific performance of the original contract will be enforced.

Fitzhugh v. Maxwell, 34 Mich. 138. Plaintiff sold land to the defendant under an executory contract. Plaintiff alleged default in payment on the part of the defendant and brings this bill praying that the contract be declared forfeited by the court. The contract itself contained no clause providing for forfeiture in case of nonpayment.

The court held that a court of equity has no jurisdiction to enforce forfeiture. That time was not made of the essence of this contract and that plaintiff has not given the defendant any notice that if the payments are not made by a certain date the contract will be forfeited. Forfeiture cannot be enforced in such a case.

Shafer v. Niver, 9 Mich. 253. The facts in this case in so far as the question of forfeiture are concerned are as follows: Plaintiff was vendee under an executory land contract and brings this bill to secure a conveyance of the premises. The payments of the purchase price were not made as soon as provided for in the contract, said contract also containing a clause of forfeiture in case the terms were not adhered to.

The court held that time was not made of the essence in this particular contract. The parties themselves by their previous actions in relation to the contract did not treat time as of the essence and there is nothing in the contract to make it especially so. Plaintiff is now ready and willing to perform and the contract was not forfeited beyond redemption by his failure to pay the installments on the date they fell due.

§ 179. Forfeiture Sustained, Illustrative Cases.—*Murphy v. McIntyre*, 152 Mich. 591. Defendant failed to make the payments as they became due upon an executory contract entered into with the plaintiff. Upon such default being made plaintiff notified defendant that because of said default the contract had become void.

The court held that mere default of the vendee alone under such a contract does not work a forfeiture. Notion of election of the vendor to forfeit is required in order to terminate the contract relation. In this case there was default and notice given by the vendor to the vendee that the contract had become a nullity. Therefore the plaintiff is entitled to immediate possession.

Jones v. Bowling, 117 Mich. 288. Plaintiff and defendant executed a land contract whereby plaintiff was to convey and defendant to purchase certain described property for a certain consideration, part to be paid down and the balance in installments due at certain specified times. According to the terms of the contract if the vendee should default in any of the payments the vendor could declare the contract void and treat previous payments as stipulated rents. The vendee in this case did fail to keep up the payments, but after such default the vendor consented to delay for a time the enforcement of the forfeiture clause in the contract in order to give the vendee time to raise more money and the vendor accepted some small payments on the contract after said extension of time. Defendant vendee did not secure sufficient funds to complete the purchase and plaintiff declared the contract forfeited. Defendant contended that the plaintiff had waived his right to declare the contract void by extending the time of payment and by accepting payments thereafter.

The court held that the right of the vendor to declare a forfeiture had not been waived by extending the time and that upon defendant's default the plaintiff was entitled, upon giving notice of his intention to rely on the forfeiture clause of the contract, to declare the contract void and to immediate possession of the premises.

§180. Forfeiture Sustained, Illustrative Cases.—*Welling v. Strickland*, 161 Mich. 235. Plaintiff brought a bill praying for the specific performance of a land contract. Plaintiff was vendee under the contract and according to the terms thereof the vendee was to pay the taxes on the premises as they became due and also to keep the property insured and in case of failure on the part of the vendee to perform these and other provisions therein contained the contract was to be immediately forfeited and notice to quit and of forfeiture were both expressly waived. The plaintiff herein did fail to pay the taxes and to keep the premises insured and the defendant declared the contract forfeited. Defendant went into possession of the premises.

The court held that the defendant was entitled to declare the contract forfeited after plaintiff failed to live up to the

obligation thereof; that it was unnecessary for him to serve notice of forfeiture on plaintiff since that notice was expressly waived by the terms of the contract itself.

Scott v. Sullivan, 159 Mich. 297. Plaintiff was the vendee or licensee under a contract whereby he was to have the right to cut timber on the premises for a period of fifteen years. It was provided in the contract that the plaintiff should pay one-half of all the taxes and assessments that might be levied against the property and that time in the payment thereof should be of the essence of the contract.

Plaintiff did not pay the taxes and the defendants who were the grantors or licensors have declared the contract forfeited.

The court held that the failure of the plaintiff to pay the taxes operated as a forfeiture of the contract. The plaintiff contended that title had passed and that the payment of the taxes was merely a condition subsequent and that equity will not enforce a forfeiture. However, the court held that the payment of the taxes was not a condition subsequent, but a condition precedent; that nonperformance thereof operated as a forfeiture, especially so since time was expressly made of the essence of the contract and the plaintiff failed for three successive years to pay the taxes; defendant has made out no case entitling him to equitable relief by showing that he forgot to pay the taxes or that he delayed payment after notice of his default because it would be inconvenient for him to make the payments.

§ 181. Forfeiture Sustained, Illustrative Cases.—*Tower v. Detroit Trust Co.*, 190 Mich. 670. The plaintiff petitioned the court to cancel a certain land contract made between himself and the Chippewa Construction Co., the defendant in this case being the receiver of the defunct construction company. According to the terms of the contract the company agreed to purchase certain property from the plaintiff herein for \$97,000. One thousand dollars of the purchase price was to be paid down and the balance in monthly payments. The down amount was paid, but none of the monthly installments were ever paid. The total amount of the purchase price was to be paid by February 1st, 1913. On that date the company was already in the hands of the defendant, its receiver, and the plaintiff

served notice on the defendant by which he exercised his rights under the contract and declared the contract forfeited.

Defendant urged that equity abhors and will not enforce a forfeiture. The court held that this forfeiture will be enforced. The defendant receiver did not tender payment nor is it doing so now. There is no prospect that it will be able to offer payment in the near future. The plaintiff complied with all the terms of the contract and has performed all the conditions of the contract that it was incumbent on him to perform. Equity will not as a general rule enforce forfeiture, but where as here, the equities of the case are all with the party seeking to have a forfeiture enforced, then equity will enforce a forfeiture.

Donnelly v. Lyons, 173 Mich. 515. The plaintiff brought a bill against the defendant to quiet title to certain property. She had contracted to sell this property, consisting of twenty-six lots, to the defendant for \$1040. Two dollars was paid down and the balance was to be paid at the rate of \$5.00 or more every three months. The first payment was due April 10th, 1910, and was never paid, the two dollar down payment being the only payment ever made. When the time for the first payment arrived and no payment was made the plaintiff proceeded to dispose of the lots elsewhere, and did sell them sometime in July to another party. Lyons assigned his contract to one Rice shortly after executing it and after the above mentioned sale to the third party by the plaintiff. Rice made a claim to the title of the lots and this bill is brought to clear up the title. After learning of Rice's claim the plaintiff immediately notified him that the contract which he held as assignee was forfeited.

The court held that the plaintiff was entitled to the relief prayed for in this bill and that she was justified in declaring forfeited the contract made with Lyons and assigned to Rice. According to the terms of the said contract defendant was to keep all taxes which should be assessed against the premises paid. The defendant defaulted in the payment of taxes for one year and without serving any notice of forfeiture plaintiff brought this action.

The court held that the plaintiff could not maintain the present action. The relations between the parties were contract relations; such relations might continue to exist after a breach by the vendee, for the vendor might decide to waive the breach or forego her action. This contract contained no provision that notice of intention to declare a forfeiture was waived and in view of such absence the vendor must terminate the contract relation by notice of forfeiture or do some affirmative act which in itself determines the contract relation before a summary action to recover possession of the premises can be begun.

§ 182. Forfeiture Sustained, Illustrative Cases.—*Satterlee v. Cronkhite*, 114 Mich. 634. The plaintiff here was the vendee in a land contract and is suing to recover from the defendant who was the vendor, the amount she had paid on the contract of purchase before she defaulted therein. The contract provided that in the event of the vendee failing to keep the installments paid as they became due the vendor should have the right to cancel the contract and to immediate possession of the premises. The plaintiff defaulted in her payments and was given notice by the defendant that the contract was void.

The court held that the plaintiff had no standing in court and could not recover what she had paid on the contract. By the terms of the contract all payments made before a forfeiture should be declared were to be forfeited to the vendor. Plaintiff had failed to perform her part of the contract and is not entitled to any relief.

Lowrie v. Gourlay, 112 Mich. 641. Plaintiff brought an action in assumpsit to recover the amount he had paid on an installment contract for the purchase of land. The contract had been declared forfeited by the defendant. Plaintiff had already been granted a decree for the specific performance of the contract in a court of equity, but the decree was dismissed because he failed and refused to pay the balance due on the purchase price.

The court held that the plaintiff had no standing in court; that he neglected to pay and never tendered the amount due on the contract. By being in default the plaintiff forfeited the amount already paid and since he was granted relief in equity if he would complete the payment of the purchase price he cannot maintain this action to recover the forfeited payments.

Truesdail v. Ward, 24 Mich. 116. Plaintiff brought a bill to enforce the specific performance of a contract to convey land. Time was expressly made of the essence of the contract and if the installment payments were not made when due the contract was to become void. Plaintiff defaulted in his payments and defendant declared the contract forfeited. Four months after this forfeiture defendant conveyed the premises to a third party. Six months later or ten months after the forfeiture was declared the plaintiff offered to pay the balance of the purchase price and upon defendant refusing to convey this bill was filed.

The court held that the defendant in this case had been justified in declaring a forfeiture. In order for the vendee in such a case to protect his equities under the contract he must not allow the vendor to suppose that he has acquiesced in the forfeiture when declared by the vendor. Here the vendee made no protest when the forfeiture was declared and since the defendant has sold the land to a third party the plaintiff's rights under the contract will be terminated.

§ 183. **Relief from Forfeiture, Necessity of Tender.**—A party seeking relief against forfeiture should tender sufficient to make the other party whole. If he does not make this tender before filing the bill of complaint he should at least make the tender by bill and the better practice would be to pay all arrearages due upon the land contract into court together with all interest, although in one case the vendee made no tender of the amount due either in the Supreme court or the lower court, but was permitted to redeem upon, paying to the clerk of the Circuit court within sixty days all arrearages due under the contract together with the costs of both courts.²³

23. *Lozon v. McKay*, 203 Mich. 364; *Hickman v. Chaney*, 155 Mich. 217; *Stickney v. Parmenter*, 35 Mich. 237; *Morris v. Hoyt*, 11 Mich. 9.

In *Lozon v. McKay*, *supra*, the plaintiff had been in arrears on one payment under a contract of \$200 and had failed to pay the taxes which were more than one year in

arrears, and had never tendered or offered to pay the sums called for by the contract. In respect to that case the court used the following language:

"It is apparently as uncertain now as it has been for years whether the plaintiffs can pay what is due to the defendant. It ought to have been tendered before suit was be-

§ 184. Relief from Forfeiture After Final Judgment by Circuit Court Commissioner.—Where the vendor elects to repossess himself of the property through proceedings by the circuit court commissioner, and the vendee does not avail himself of the privilege of paying the amount due, under the statute within 30 days of the date of the rendition of the judgment before such commissioner,²⁴ equity will not entertain a bill for specific performance or for relief from the forfeiture effectuated by the judgment of the circuit court commissioner, in the absence of fraud, accident, or mistake.²⁵

§ 185. Relief from Forfeiture—Bill of Complaint, Form of—Including Averments for Specific Performance and Injunctive Relief.—Usually a vendee in filing an action to obtain relief from forfeiture of a land contract requires injunctive relief to prevent the defendant from dispossessing him during the pendency of the equity action, and specific performance of the contract, as the attitude of the vendor in forfeiting such agreement is indicative of some unwillingness on his part to carry out the terms thereof.

The following form of bill of complaint for relief from forfeiture contains averments both for specific performance, and injunctive relief pending the action.

(Address and Introduction.)

1. That on or about the.....day of.....the plaintiff herein, and C. D., the above named defendant, made

gun, in which case it is likely that no suit would have been necessary. The money should in any event have been brought into court so that the court might be certain that the terms upon which relief from forfeiture was granted would be complied with."

However, notwithstanding the somewhat forceful language used, the Supreme Court in this case reversed the decree of the Ogemaw Circuit Court upon the condition that the plaintiffs pay within sixty days after the entry of the decree the unpaid purchase price of the land, together with all ar-

rearages of interest and taxes, and also the costs of both courts.

24. Public Acts 243, 1917, providing that where a judgment for restitution of the premises shall be given in possessory proceedings before a Circuit Court Commissioner where an executory contract for the sale of land is forfeited, the commissioner shall determine the amount due upon the contract, and if the vendee shall pay such amount within 30 days, the judgment shall be vacated.

25. *Security Investment Co. v. Meister*, 214 Mich. 338.

and entered into a certain agreement and contract in writing for the sale by said defendant to this plaintiff of the following described real estate to wit: (here describe the real estate), upon the following terms and conditions: (here state briefly the terms of the contract, and particularly the condition of the contract violated), a true copy of such contract being hereto attached, marked "Exhibit A," and made a part hereof.

2. That this plaintiff has in all respects fully carried out the terms and conditions of said contract on his part to be performed except as hereinafter set out and has paid to said defendant upon such agreement the following sums of money, to-wit: (here state the amounts and dates if possible of the various sums of money paid upon the agreement together with interest and taxes) upon said property making a total of..... dollars paid by the plaintiff to the defendant upon said contract. (If the plaintiff has made any valuable improvements on the land, set out in detail the character and value of such improvements so that the bill will show the full value of plaintiff's equity in the property.)

3. That on the.....day of....., a payment became due on said contract amounting to.....dollars and that on said date plaintiff was absent from the city of..... where, plaintiff then resided, and the fact that such payment on said contract became and fell due on said date had temporarily slipped from the memory, of plaintiff, and by reason whereof plaintiff failed to make said payment in accordance with the terms of said contract: (or, here state any other reason why the payment was not met or why vendee became in default).

4. That upon plaintiff's return to said city, to-wit, on the.....day of.....plaintiff immediately tendered to said defendant the amount of such payment together with interest thereon from the date said payment became due, but that said defendant then and there wholly refused to accept said payment and then and there served on this plaintiff a notice declaring said contract wholly forfeited, which course defendant had a right to take according to the provisions of said contract and that said defendant refused to recognize this plaintiff as a party to said contract, or that said contract

is now existent and claims that the same has been wholly forfeited and is about to begin an action at law against this plaintiff to recover possession of said real estate and will do so and dispossess this plaintiff, thereby causing plaintiff irreparable damage unless restrained by this Honorable Court from so doing.

5. That said property has greatly enhanced in value since plaintiff has purchased the same and that to permit a forfeiture of said contract under the circumstances would be wholly unjust, unconscionable and inequitable; that unless plaintiff shall be permitted to redeem from the forfeiture of said contract, as thus declared by the defendant, plaintiff will suffer great and irreparable loss and damage by way of a penalty and will lose all moneys he has paid upon said contract and all the various sums he has from time to time invested in improvements in said property and the increase in the value thereof amounting in the aggregate to the sum of.....dollars.

6. That prior to the institution of this action, to-wit, on the day of.....this plaintiff tendered to the defendant the sum of.....dollars, being the total amount due upon said contract together with interest on the same as provided in said contract, which tender the defendant then and there refused and plaintiff hereby tenders and has paid to the Clerk of this Court said sum and hereby tenders and stands ready and willing to pay to the defendant any and all loss which the defendant may have sustained by reason of plaintiff's default under said contract.

7. That said defendant has suffered no loss or disadvantage by reason of plaintiff's failure to pay said installment as provided in said contract as herein set forth and will suffer no loss if plaintiff is allowed to redeem from said forfeiture.

8. That this plaintiff is now ready and willing to specifically perform said contract on his part, although the defendant herein has wholly neglected, failed, and refused to carry out the terms of said agreement or to specifically perform the same.

Wherefore, plaintiff prays the following relief:

1. That a restraining order issue from this Honorable Court enjoining and restraining said defendant from beginning any action at law for the recovery of said premises, or from selling,

assigning and transferring the same during the pendency of this action and until the farther order of this court.

2. That this plaintiff may be permitted to redeem from the forfeiture of said contract and defendant's interest therein as hereinbefore set forth and averred.

3. That the defendant herein, C. D., may be decreed specifically to perform the said agreement entered into with the plaintiff as aforesaid, this plaintiff being ready and willing and hereby offering specifically to perform said agreement on his part.

4. That plaintiff have such other, further and different relief as may seem agreeable to equity and good conscience.

§ 185A. Pleadings and Briefs Used in Late Michigan Cases Involving Relief from Forfeiture—Specific Performance.—Continued.

LOZON v. McKAY, 203 Mich. 364.

- (a) Statement of Fact.
- (b) Bill of Complaint.
- (c) Defendant's Answer.
- (d) Brief for Plaintiff.
- (e) Brief for Defendant.
- (f) Holding of Court.

HUBBELL v. OHLER, 213 Mich. 664.

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer to Bill.
- (d) Answer of Plaintiff to the Cross-Bill of Defendants.
- (e) The Contract Involved—"Exhibit B".
- (f) Transfer of the Contract to Plaintiff Hubbell—"Exhibit C".
- (g) Notice of Forfeiture—"Exhibit A".
- (h) Decree.
- (i) Brief of Counsel, John M. Dunham, for Plaintiff.
- (j) Brief of Counsel, Ellis & Ellis, and Clark H. Gleason, for Defendant.

LOZON v. McKAY, 203 Mich. 364.

(a) Plaintiff filed Bill of Complaint, praying for specific performance of a land contract. As will appear from the Bill of Complaint no mention is made to relief for forfeiture, but the court decreed that specific performance would not be granted but would consider the Bill as amended so as to ask for relief from forfeiture.

(b) Bill of Complaint.—(Caption.) Complaining, the plaintiffs herein, Archie Lozon and Alice Lozon, husband and wife, respectively, represent unto the court:

I. That on to-wit the 4th day of April, A. D. 1914, they entered into a contract in writing, which contract was in duplicate, with Ephriam Roe and Cora M. Roe and Jessie O. Roe and Bannie Roe and Ernest Roe, for the purchase of a piece or parcel of land situate in the Township of Mills, Ogemaw County, Michigan, and described as the north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section eleven (11), township twenty-one (21) north of range three (3) east, containing eighty (80) acres of land as shown by the return of the surveyor general, upon the terms and conditions and in tenor, substance and effect as follows:

This contract, made in duplicate this 4th day of April, 1914, between Ephriam Roe and Cora M. Roe, and Jessie O. Roe and Bannie Roe and Ernest Roe, party of the first part, and Archie Lozon and Alice Lozon, his wife, of Bay City, Michigan, party of the second part.

Witnesseth: That said party for and in consideration of the sum of eighteen hundred and fifty (\$1850.00) dollars, to be to it duly paid as herein specified, hereby agree to sell and convey to said party of the second part, subject to reservations herein contained, all the following described lands situated in the Township of Mills, County of Ogemaw, State of Michigan, to-wit:

The north half (N. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section eleven (11), township twenty-one (21), north of range three (3) east, containing eighty (80) acres, according to the return of the surveyor general. Which said sum the said party of the second part agrees to pay to said party of the first part at its office as follows:

Ten hundred and fifty (\$1050) dollars at the date hereof and the balance of eight hundred (\$800) dollars as follows: Two hundred (\$200) dollars on April 4th, 1916, and one hundred (\$100) dollars on April 4th, 1917, one hundred (\$100) dollars on April 4th, 1918, and the balance of four hundred (\$400) dollars on April 4th, 1919, with privilege of second party paying all or any part at any time hereafter, with interest on all sums at any time unpaid hereon at the rate of six per cent (6%) per annum, payable semi-annually. Said parties of the second part also agree to pay in due season all taxes and assessments extraordinary as well as ordinary that shall be taxed or assessed on said land, including the taxes thereon for the year 1914.

It is agreed by the parties hereto that the party of the first part of receiving payments in full of the said principal and interest at the times and in the manner above mentioned and of all other sums chargeable in its favor hereon, shall and will at its own proper cost and expense, execute and deliver to said party of the second part a good and sufficient warranty deed and abstract of said above described land, free and clear of and from all liens and encumbrances, except such as may have accrued on said land subsequent to the date hereof by or through the acts of negligence of the parties of the second part.

It is also mutually understood that this contract contains all the representations and agreements.

It is also agreed by the parties hereto that the parties of the second part shall have possession of said land under this contract on the delivery hereof.

It is also agreed by the parties hereto that if the said party of the second part shall fail to perform this contract or any part of the same and shall remain in arrears for thirty (30) days after notice to said second parties given by a letter addressed to said second parties at the address herein, that thereupon said first party shall have the right to declare this contract void and to retain all moneys which may have been paid hereon, and the improvements which may have been placed on said land, as stipulated damages for the non-performance of this contract and as a reasonable rental for said land, and may consider and treat said parties of the second part as its tenant, holding over without permission, and may take immediate possession of said land and remove said parties of the second part therefrom. And it is agreed that the stipulations herein contained are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In witness whereof, the parties hereto have hereunto, and to a duplicate hereof, set their hands and seals the day and year first above written.

Ephriam Roe and Cora M. Roe,
Jesse Roe, Bannie Roe,
Ernest Roe,
Archie Lozon,
Alice Lozon.

Signed, sealed and delivered in the presence of: S. R. Turner, W. H. Richardson.

Duplicate of such contract being now in possession of plaintiffs, when produced and proved as this court shall direct, will fully appear, and whereto reference is prayed.

II. The plaintiffs further show to the court that directly following the signing of the said contract in duplicate, they paid to the said parties of the first part thereto ten hundred and fifty (\$1050) dollars in cash and immediately took possession of the said above described land and moved thereupon and erected a cement house thereon costing them between eleven hundred (\$1100) and twelve hundred (\$1200) dollars and otherwise made improvements upon the said lands by clearing up about sixty (60) acres thereof and stumping the greater portion of same and building and erecting fences thereon; and that in addition to paying the said named parties of the first part the said sum of ten hundred and fifty (\$1050) dollars, these plaintiffs had expended in building, clearing, stumping, fencing and improving said farm about two thousand (\$2000) dollars.

III. The plaintiffs further show that at the time and after they had entered into the contract above set forth with the above named parties of the first part, they were given to understand that inasmuch as they had made a large cash payment upon the said land and would go ahead and improve the farm as they then proposed doing, that they, the said

named parties of the first part, would not be in a hurry and would not consider time the essence of this contract in the event these plaintiffs should fail to make the payment of two hundred (\$200) dollars then due on such contract April 4th, 1916.

IV. That plaintiffs further show to the court that they are at the present time temporarily residing in Bay County, Michigan, and that they have an agent and representative residing upon the farm and working and clearing the land for them; that upon the 5th day of May, 1916, they received a letter at their home at Kawkawlin, Michigan, purporting to come from James McKay, Prescott, Michigan, advising them that he, McKay, had purchased all the right, title and interest of Ephriam Roe and wife, and Jesse Roe and wife in and to the land set forth and described in said contract, and that he, the said McKay, desired the plaintiffs to pay to him the two hundred (\$200) dollars due April 4th, 1916. That at such time these plaintiffs relying upon the understanding they had had with the said Roes was not able to forthwith advance the said sum of money, but at once made efforts to get in touch with the said Roes and ascertain if the lands had been sold to McKay as stated by him. That owing to circumstances beyond the control of the said plaintiffs, they were unable to raise the said sum of two hundred (\$200) dollars as soon as they would have liked to and upon the 28th day of July, as these plaintiffs now recall it, they received a notice signed by James McKay as assignee of the said vendors named in the said contract, which notice recited the making of a contract, the failure of these plaintiffs to pay the two hundred (\$200) dollars due April 4th, 1916, promptly, and stating that he, the said McKay, had upon the 28th day of July, 1914, purchased the said lands from the Roes aforesaid and had become assignee of their duplicate copy of the contract and in substance declaring a forfeiture of all right, title and interests of these plaintiffs in and to the said land by reason of their failure to pay the said two hundred (\$200) dollars and some interest due, April 4th, 1916; and likewise notifying these plaintiffs to quit, surrender and deliver up to him, the said James McKay, the lands and premises by these plaintiffs heretofore purchased of the said parties of the first part to the land contract above set forth and upon which lands they had added improvements to the amount of two thousand (\$2000) dollars or more.

V. These plaintiffs further show that upon receipt of the said notice from the said James McKay declaring a forfeiture, they immediately sent Charles W. Hitchcock, an attorney at law, of Bay City, Michigan, to Prescott, Michigan, to see the said McKay with relation to the matter. That Mr. Hitchcock immediately interviewed Mr. McKay at his bank in the Village of Prescott, Ogemaw County, Michigan, stating to Mr. McKay that he had come there as the representative of these plaintiffs and was desirous of paying up all that was unpaid on the land described in the contract set forth in the first paragraph of this Bill of Complaint. That Mr. McKay informed Mr. Hitchcock at that time, which was some time in the month of August, 1916, that he, Mr. McKay, could not accept

a tender of the money for the reason that he did not know at that time how much was due upon the lands, inasmuch as there were costs for the service of Notice of Forfeiture and he would have to interview his attorney, William T. Yeo, West Branch, Michigan, and ascertain what said costs amounted to, and further told Mr. Hitchcock that Mr. Yeo had all the papers relating to the matter in question so that he could not at that day accept a tender.

VI. The plaintiffs further show that they have since been advised that Mr. McKay refuses to give them a deed of the said premises and that he is contemplating selling the said land; and they are further advised that the said McKay absolutely refuses to receive or accept the said moneys for principal, interest and any and all expense of serving the notice of forfeiture.

VII. That these plaintiffs have always been willing and desirous of paying for the said lands and still are ready and willing and now offer fully and specifically to perform their part of the said agreement.

Wherefore, your orator prays:

1. To the end therefore that the said James McKay, the defendant hereto, may without oath, all answer upon oath being hereby waived, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged.

2. And that the said James McKay may be decreed to specifically perform his part of the said agreement; your orators, plaintiffs herein, being ready and willing and hereby offering to specifically perform the same upon their part.

3. And that the said James McKay may come to an account with these plaintiffs touching the amount due and owing by these plaintiffs to him as its owner in fee of the said land, on the said agreement these plaintiffs being ready and willing and hereby offer to pay him the full amount that shall be found due to him on such accounting; and these plaintiffs ask leave to pay a deposit on the same with the Register of this court for the said James McKay, to be paid to him according to the order and directions of this court.

4. And that upon such payment to the said James McKay or the Register of this court, for the said James McKay, he, the said James McKay, be decreed to convey to these plaintiffs a good and sufficient deed of conveyance duly executed and acknowledged, all and singular the said land in fee simple together with an abstract of title thereto as provided in said land contract with the said Roes. And that upon such payment to the said James McKay, or to the Register of this court as aforesaid, these plaintiffs be decreed to be the owners of the said lands and premises and of each and every part or parcel thereof in fee simple; and that the said James McKay be decreed to be divested of all right, title and interest therein; and that these plaintiffs have leave to cause such decree to be recorded in the office of the Register of Deeds of the said County of Ogemaw, as a conveyance of all the said lands and premises from the said James McKay to these plaintiffs; and that these plaintiffs may have

such further relief and such other relief in the premises as shall be agreeable to equity and good conscience.

And these plaintiffs shall forever pray.

Archie Lozon,
Alice Lozon.

Charles W. Hitchcock,
Attorney for Plaintiffs.
(Proper verification.)
Exhibit A.

West Branch, Michigan,
May twenty-first, 1916.

Mr. Archie Lozon,
Mrs. Alice Lozon,
Kawkawlin, Mich.

Dear Sir:—I address you in relation to a certain land contract executed by Ephriam Roe and wife, Jesse Roe, to Archie Lozon and Alice Lozon, dated April 4th, 1914, for the purchase of the north half of the northeast quarter of section 11, town 21 north, range 3 east. Under the terms of this land contract there is due and unpaid thereon the sum of two hundred dollars on the principal thereof, together with interest on the sum of eight hundred dollars from September 4th, 1914, at six per cent per annum.

Ephriam Roe and wife and Jesse Roe and wife have conveyed to me their interest in said lands as well as their interest in said land contract and at the present time I am the owner of the rights heretofore possessed by the said Ephriam Roe and Jesse Roe.

Pursuant to the terms of said land contract, I hereby notify you in writing of your default in the payment of said moneys due on said land contract, and I insist upon the payment of such moneys forthwith.

I further notify you that unless such moneys are paid forthwith, I shall serve upon all the parties having any interest in said lands a notice declaring a forfeiture of all rights possessed by the grantees named in said contract and their assigns.

I therefore urge upon you to give this matter your immediate attention if you desire to protect your rights in said lands.

Respectfully submitted,

James McKay,
by William T. Yeo,
His Agent and Attorney.

Exhibit B.

To Archie Lozon, Alice Lozon, William Wickert and Cordelia Wickert:

Take notice, that whereas, on the fourth day of April in the year 1914, there was executed a certain land contract between Ephriam Roe and Cora M. Roe, his wife, and Jesse O. Roe and Barnee Roe, as parties of the first part, and the said Archie Lozon and Alice Lozon, of the City of Bay City, Michigan, as parties of the second part, wherein the said Ephriam Roe and Cora M. Roe, his wife, and Jesse O. Roe, Barnee Roe and

Ernest Roe, in consideration of the sum of eighteen hundred and fifty dollars to be paid to them, and of the covenants to be performed by the said parties of the second part therein named, agreed to sell to the said parties of the second part the following described lands situated in the Township of Mills, County of Ogemaw, State of Michigan, to-wit: the north half of the northeast quarter of section eleven, town twenty-one north, of range three east, containing eighty acres, according to the returns of the surveyor general, and in consideration thereof, the said party of the second part therein, then and there agreed to purchase from the said parties of the first part the said described land and to pay for the same to the said parties of the first part the said sum of eighteen hundred fifty dollars in the manner following, that is to say: Ten hundred fifty dollars at the date of said contract and the balance of eight hundred dollars as follows: two hundred dollars on April 4th, 1916, and one hundred dollars on April 4th, 1917, and one hundred dollars on April 4th, 1918, and the balance of four hundred dollars on April 4th, 1919, with the privilege of paying all or any part at any time from date of said land contract, with interest to be computed from the date of said land contract on all sums at any time unpaid thereon at the rate of six per cent per annum, payable semi-annually; and

Whereas, It was further expressly provided in said land contract that said party of the second part shall pay in due season all taxes and assessments extraordinary as well as ordinary that shall be taxed or assessed on said land, including the taxes thereon for the year 1914; and

Whereas, It is further mutually covenanted and agreed by and between the parties named in said land contract that the said parties of the second part shall have possession of said lands under this contract from and after the delivery of said land contract; and

Whereas, It was further covenanted and agreed by and between the parties named in said land contract that if the said parties of the second part shall fail to perform said contract or any part of the same and shall remain in arrears for thirty days after notice to said second parties given by a letter addressed to said second parties at the address herein that thereupon the said first parties shall have the right to declare said contract void and to retain all moneys which may have been paid thereon and the improvements which may have been placed on said lands, as stipulated damages for the non-performance of said contract and as a reasonable rental for said land, and may consider and treat said parties of the second part as their tenants holding over without permission, and may take immediate possession of said lands and remove said parties of the second part therefrom; and

Whereas, The said parties of the first part in said land contract named, conveyed all their right, title and interest in and to said described lands on the twenty-eighth day of July, A. D. 1914, and thereby also assigned all their right, title and interest in and to said land contract; and

Whereas, The said Archie Lozon and Alice Lozon, his wife, have abandoned the possession and use of the said described lands, having removed therefrom to near the Village of Kawkawlin in said state. That William Wickert and Cordelia Wickert, his wife, are now occupying the said lands under a certain lease from the said Archie Lozon and Alice Lozon; and

Whereas, The said James McKay on the twenty-fifth day of May, A. D. 1916, addressed a certain letter in writing to each of the said Archie Lozon, Alice Lozon, William Wickert and Cordelia Wickert, wherein the said James McKay notified each of said parties that default had been made in the payment of the money due on said land contract and insisting upon the payment of such moneys forthwith, also advising them that if payment was not made that he, the said James McKay, would declare a forfeiture of such rights as may be possessed by them under said land contract. That said letters in writing were received by each of said above named parties by registered letter and receipt therefor signed by each of said parties is now in possession of the said James McKay; and

Whereas, The said Archie Lozon, Alice Lozon and William Wickert have failed and neglected to pay the installments becoming due on said land contract as aforesaid on April fourth, 1916, and the interest on the several sums of money remaining unpaid, and the taxes levied upon said lands as expressly provided in said land contract.

Wherefore, By reason of default having been made in the terms, covenants and conditions set forth in said land contract as aforesaid, therein agreed to be performed by the said Archie Lozon and Alice Lozon as vendees therein, as in said contract expressly provided, I, the said James McKay, do hereby declare a forfeiture of all rights that may have been heretofore possessed by the said Archie Lozon, Alice Lozon and William Wickert, and that said land contract is null and void because of such default, and that the said Archie Lozon, Alice Lozon and William Wickert, and each of them, be and are hereby declared to be without right or claim in and to said described lands or the hereditaments and privileges thereunto belonging or in anywise appertaining thereto, and that the said Archie Lozon, Alice Lozon and William Wickert are also herewith required to execute a release of all rights and claims heretofore possessed by them or either of them in said lands and premises to me, and I hereby offer to pay the expense of executing releases of said lands and in default of the execution of such releases, I will take such proceedings as I deem advisable in order to remove the cloud to my title occasioned by the execution of said land contract as aforesaid; and also by reason of the forfeiture of all rights and claims that may have been possessed by you or either of you as vendees under said land contract or lessee under such vendees, and I hereby require you to immediately quit, surrender and deliver up possession to me of the lands and premises heretofore described.

Dated at the Township of Richland, County of Ogemaw, State of Michigan, this twenty-eighth day of July, A. D. 1916.

Assignee of said vendors named
in said land contract.

Attorney for said assignee of said vendors.
Business address, West Branch, Mich.

Verification of Sheriff of County of Bay.

Verification of Sheriff of County of Ogemaw.

(c) Defendant's Answer.—(Caption.) The Answer of James McKay, defendant, to the Bill of Complaint of Archie Lozon and Alice Lozon, plaintiffs.

This defendant, saving and reserving to himself all benefit and right of exception to the said Bill of Complaint, for Answer thereto, says:

1. Defendant has no personal knowledge of the execution of the contract as set forth in said paragraph, but admits that he is in possession of a duplicate copy of the contract as particularly set forth in paragraph I of said Bill of Complaint.

2. Defendant, in answer to paragraph II of said Bill paid upon said land contract and the only information he has in respect to same is the allegation contained in said land contract.

Defendant denies that plaintiffs erected upon said land a house costing twelve hundred dollars, or that they cleared of the land about sixty acres or that the total improvements upon said land amount to two thousand dollars. This defendant represents the facts to be that there was erected upon said land a skeleton cement block house which was not finished on the inside and which did not cost to exceed six hundred dollars at the time it was originally built and that the said house has not been kept in repair, until at the present time, it is not worth nearly as much as it originally cost. That plaintiffs did not do any new clearing upon said lands, as the only clearing now upon said lands was done prior to the time of the purchase by plaintiffs. That the only improvement upon said lands was the erection of said house, but that by reason of said premises not being kept in a good state of repair, that the said premises are not worth as much as when plaintiffs purchased same.

3. In Answer to paragraph III of said Bill of Complaint, this defendant has no knowledge of any such agreement as is therein set forth, so leaves plaintiffs to their proofs.

4. Defendant in answer to paragraph IV of said Bill of Complaint denies that plaintiffs are residing temporarily in Bay County, but insists that they have removed from Ogemaw permanently. Defendant denies each and every allegation contained in said paragraph except as herein-after stated, as follows: That at a considerable time prior to the time that plaintiffs removed to Bay County, some question arose as to the title to a portion of said lands, and that in order to clear such title, the said plaintiffs and this defendant joined in the signing of a notice of re-con-

veyance which was subsequently published in the Herald-Times, a newspaper circulating in said County of Ogemaw, and that by reason of the nature of the proceeding the said plaintiffs were advised at that time that said defendant was the owner of said lands subject to the land contract possessed by said plaintiffs. That prior to the time that plaintiffs moved to Bay County, this defendant was insisting upon payment of the amount then due upon the said contract, and said plaintiffs stated to this defendant that they expected to get the money from Jacob C. Weinberg, of Prescott, Michigan, with which to pay this defendant, and shortly thereafter plaintiffs moved from said County of Ogemaw; thereafter this defendant wrote to plaintiffs and advised them that Jacob C. Weinberg would not make them the loan on said lands. Plaintiffs later wrote to this defendant stating in effect that they expected to obtain a loan from a banker in Kawkawlin, whereupon this defendant called up the banker referred to by them, by telephone, in respect to such loan, said banker then and there stating to said defendant that he did not care to make such loan. Then later, on or about the 25th day of May, 1916, said defendant caused to be sent to each of said plaintiffs a letter, therein stating in words and figures as set forth in the annexed Exhibit A. That this defendant did not receive any reply to said letter nor did either of said plaintiffs communicate with this defendant in any manner.

That subsequent thereto and on or about the fourth day of August, A. D. 1916, this defendant caused to be served upon the said plaintiffs and upon the occupants of said lands a notice declaring a forfeiture of said land contract which said notice and proof of service thereon is in words and figures as set forth in the annexed Exhibit B.

Defendant denies that plaintiffs ever at any time advised this defendant that they had any private understanding as to any extension of time within which to make the payments as provided in said land contract and also denies that plaintiffs made improvements on said land which at the present time enhances the value of said land any more than the said lands were worth at the time of the purchase of same by plaintiffs under said land contract.

5. This defendant, in answer to paragraph V of this Bill of Complaint, while admitting that one Charles W. Hitchcock, called upon him at his bank in the Village of Prescott, Ogemaw County, Michigan, in respect to said land contract, that Mr. Hitchcock claimed to have in his possession a duplicate copy of said land contract and this defendant then and there stated the amount that plaintiffs had paid upon contract. This defendant further denies that said Mr. Hitchcock tendered to this defendant any money to be applied upon said land contract.

6. This defendant, in Answer to paragraph VI of said Bill of Complaint, denies that any person, in behalf of said plaintiffs, has at any time or place tendered to him the amount remaining unpaid upon said contract or any portion of the costs or expenses incident to the Declaration of Forfeiture of said land contract; that no person has conversed or communicated with the defendant in respect to this defendant giving a

deed of the said premises or in any manner affecting the rights of said plaintiffs.

7. This defendant, in answer to paragraph VII of said Bill of Complaint, denies that plaintiffs have ever suggested to the said defendant that they are ready and willing to pay the balance remaining due and unpaid upon said land contract.

8. This defendant denies the right of said plaintiffs to the relief as prayed in said Bill of Complaint, and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Affirmative Matter in the Nature of a Cross-Bill.—The said James McKay, defendant named in the Bill of Complaint filed herein, for further equitable relief, claims the benefit of a cross-bill and bases his right to same on the facts heretofore admitted as well as the additional facts herein set forth.

First: This defendant respectfully shows unto the court that in said land contract it is expressly provided, "that if the said party of the second part shall fail to perform this contract or any part of same, and shall remain in arrears for thrity days after notice to said second parties given by a letter addressed to said second parties at the addresses herein, that thereupon, the said first party shall have the right to declare this contract void and to retain all the moneys which may have been paid hereon and the improvements which may have been placed on said lands, as stipulated damages for the non-performance of this contract as a reasonable rental for said lands, and may consider and treat said parties of the second part as its tenant, holding over without permission, and may take immediate possession of said lands and remove said parties of the second part therefrom."

That upon default being made in the payment of said sum of two hundred dollars on April fourth, 1916, that this defendant caused to be sent to the said plaintiffs the letter as set forth in paragraph IV of said Bill of Complaint in words and figures as contained in said Exhibit A, and after waiting more than thirty days within which the said plaintiffs could have complied with the terms of the said land contract in the payment of the moneys then due upon said land contract, this defendant, on or about the fourth day of August, A. D. 1916, caused to be served upon the said plaintiffs the notice declaring a forfeiture of said contract as admitted by plaintiffs in paragraph IV in said Bill of Complaint in words and figures as contained in said Exhibit B.

Second: That said notice herein referred to as Exhibit B, also demanded of the said plaintiffs that they execute a release of all rights and claims theretofore possessed by them or either of them in said lands and premises, to this defendant, this defendant then and there offering to pay the expense of executing such releases, and that in default of the execution of such releases, this defendant gave notice that he would take such proceedings as he deemed advisable to remove the cloud to his title; that said notice also required of the said plaintiffs to quit, surrender and deliver up possession to him of the lands described in said land contract;

but said plaintiffs have hitherto refused to execute such releases of their interest in said lands under said land contract.

Third: That the said land contract in the possession and control of said plaintiffs and the rights claimed in said lands as in said Bill of Complaint particularly set forth, constitutes a cloud on the title of this defendant to the lands and premises, and has the effect to greatly depreciate the value thereof and to cloud the title heretofore possessed by the vendors in said land contract named and their assigns as set forth herein.

Fourth: Forasmuch, therefore, as this defendant is without remedy in the premises except in a court of equity, this defendant prays:

(a) That said plaintiffs herein may, if they can show why this defendant should not have the relief hereby prayed, without oath, all answer on oath being hereby waived, full, true, direct and perfect answer make to all and singular the matters herein stated and charged.

(b) And that the said land contract may be decreed to be null and void and to be a cloud upon the title of said defendant to the said lands and to be delivered up to be cancelled.

(c) And that the record of said land contract that may remain in the office of the register of deeds for the County of Ogemaw be discharged and decreed to be null and void.

(d) And that this defendant have leave to cause such decree to be recorded in the office of the said register of deeds of said County of Ogemaw.

(e) And that this defendant may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

(f) And this defendant will ever pray.

James McKay, Defendant.

William T. Yeo,

Attorney for Defendant,

Business Address, West Branch, Mich.

(Verification.)

(d) Brief for Plaintiffs.—This court has repeatedly in its opinions held against strict foreclosure. If the defendant in this case prevails we submit that the entire proceeding smacks of a strict foreclosure and ought not to be approved if plaintiffs were, even after notice of forfeiture, in position to make the defendant whole. "A party seeking relief against forfeiture should tender sufficient to make the other party whole." *Morris v. Hoyl*, 11 Mich. 9. *Stickney v. Parmenter*, 35 Mich. 237. *Hickman v. Chaney*, 155 Mich. 217. *Sweet v. Purinton*, 166 N. W. 161.

In this case there was no actual tender, but every other thing was done which could be done under the circumstances, and that immediately after notice of forfeiture. We believe that plaintiffs being in possession defendant had two remedies,—1st: either to begin summary proceedings, or second, to begin foreclosure proceedings. In either of these events plaintiffs would have had the right to redeem.

If the service of a notice of forfeiture divested plaintiffs of all their right in said property then defendant has no reason to come into a court of equity and ask to have a cloud removed from his title because if this mere service of a notice of forfeiture divests plaintiffs of their rights in said property, then said court would have nothing to take away from them because they have nothing to do with it. 3 C. L. 1915, Sec. 13253, *Lambton Loan & Investment Co. v. Adams*, 132 Mich. 350.

The above case is short and we think to the point because of the fact that if plaintiffs were in possession no steps were taken by defendant to oust them.

(e) Brief for Defendant.—All the rights of plaintiffs have become forfeited at law as was held in the case of *Pendil v. Union Mining Co.*, 64 Mich. 174. The court is not asked to declare the forfeiture but to ascertain whether or not the complete forfeiture exists and if so to remove the cloud. The Bill does not ask the court to do the thing but to ascertain whether it has been done and if so to declare its effect upon the title to complainants' property.

In the case of *Donnelly v. Lyons*, 173 Mich. 515, the facts therein are similar as to claim of attempt to make payment after notice of forfeiture and that defendant should have resorted to some other action, in which case the court in reviewing the authorities therein stated found in respect to tender: "It does not seem reasonable, however, that if he had made a bona fide offer to carry out the contracts he could not have done so. He did not have any difficulty in making a tender both to her and her attorney after notice of forfeiture." There certainly could be no necessity of bringing a personal action under these facts where no personal occupancy or interference would be encouraged in the taking of possession, and therein referring to the case of *Lambton Loan & Investment Co. v. Adams*, 132 Mich. 350, the said court held: "'The proceeding commented upon was purely a possessory action and no such proceedings are necessary in the instant case.'"

(f) Holding of the Court.—It is clear that a decree for specific performance cannot be made. Treating the Bill as amended so as to ask for relief from the forfeiture and extend to their limits the rules governing the granting of relief in such cases, the decree below may be modified so as to relieve plaintiffs from the forfeiture upon the condition that within sixty days after entry of decree in this court they pay to defendant or to the Register of the Circuit Court for the County of Ogemaw the unpaid purchase price of land with all arrearages of interest and any sum paid by defendant for taxes upon the land with costs of both courts, upon which payment defendant shall execute and deliver the conveyance in accordance with the contract. In default of which payment defendant shall have the relief granted him in the court below with costs of both courts.

HUBBELL v. OHLER, 213 Mich. 664—

(a) Brief Statement of Fact.

(b) Bill of Complaint.

(c) Answer to Bill.

(d) Answer of Plaintiff to the Cross-Bill of Defendants.

(e) The Contract Involved—"Exhibit B."

(f) Transfer of the Contract to the Plaintiff Hubbell—"Exhibit C."

(g) Notice of Forfeiture—"Exhibit A."

(h) Decree.

(i) Brief of Counsel, John M. Dunham, for Plaintiff.

(j) Brief of Counsel, Ellis & Ellis, and Clark H. Gleason, for Defendant

HUBBELL v. OHLER, 213 Mich. 644—

(a) Brief Statement of Fact.

This was an action for specific performance brought against the defendants upon a land contract wherein the plaintiff had paid one-half the purchase price by the transfer of other property, leaving a balance due upon the contract of \$3000.00. The contract was in the usual form with the exception that it contained a clause reading as follows:

"That it shall be lawful for said parties of the first part at any time after the violation or non-fulfillment of any of said agreements on the part of the said parties of the second part, to sell or convey said land or any part thereof to any other person whatsoever."

The plaintiff having become in arrears upon the interest and taxes upon said contract caused a notice of forfeiture to be served upon the plaintiff, forfeiting the contract, and declaring all of plaintiff's rights thereunder at an end.

A few days later, the vendor sold and conveyed said land to one Byers for a valuable consideration, and Byers at once took possession of the property and since lived upon it.

The plaintiff after he purchased the property did not occupy it, so that possession was obtained without resort to legal proceedings.

Upon a trial in the lower court, plaintiff's bill of complaint was dismissed and a decree was entered ordering plaintiff to surrender possession of the property.

Upon appeal to the Supreme Court, the decree of the lower court was modified so as to permit the plaintiff relief from the forfeiture, upon certain conditions.

(b) Bill of Complaint.—State of Michigan. In the Circuit Court for the County of Kent, in Chancery;

To the Circuit Court for the County of Kent, in Chancery:

Your plaintiff, Jeremlah C. Hubbell, of the City of Grand Rapids, said county, represents unto this court as follows:

I. That on the 29th day of June, 1917, Louis J. Ohler and Agnes A. Ohler were seized and possessed in fee simple of the following described lands and premises, lying and being situated in the Township of Wyoming, County of Kent, and State of Michigan, known and described as follows:

"The east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section fifteen (15) in township six (6) north of range twelve (12) west, except nine and one-half ($9\frac{1}{2}$) acres in width from the west side thereof, and except a parcel conveyed in deed recorded in liber 399 of deeds, on page 578."

And on said last mentioned date, the said Louis P. Ohler and Agnes A. Ohler entered into a certain land contract with Andrew D. Boomsma and Lucy Boomsma, husband and wife, a copy of said contract being hereto attached and marked Exhibit A, and made a part of this bill of complaint; said contract was for the purchase of the land hereinbefore described for the sum of six thousand (\$6000.00) dollars, and provided that three thousand dollars was paid upon the execution of the contract, leaving unpaid the sum of three thousand (\$3000.00) dollars, with a payment on principal of \$100.00 to be made on the 1st day of August, 1919, and \$100.00 annually thereafter, with interest payable semi-annually.

II. Plaintiff further alleges that he purchased the contract interest of Andrew D. Boomsma, whose wife Lucy had died since the making of said contract, on the 1st day of August, 1918, and has an assignment from said Andrew D. Boomsma of the same, a copy of said assignment being hereto attached and marked Exhibit B, and made a part of this bill of complaint.

III. Plaintiff further alleges that in the taking of said assignment he assumed the interest from the date of said contract to August 1st, 1918, together with the taxes on said land for the year 1917, which past due interest and taxes this plaintiff paid to said Louis P. Ohler, who receipted for the same to him and who thus had knowledge during the month of August, 1918, that this plaintiff had purchased the contract interest in said land of the said Andrew D. Boomsma.

IV. Plaintiff alleges that he immediately took possession of said lands, but he did not move thereon, as he is a single man, and did not purchase said farm for the purpose of occupying it, but through his agents put a sign on the house on said farm for the sale of said premises, looked after the growing crops, advertised the farm for sale, and in various ways let it become known that he had bought said premises.

V. Plaintiff further says that about a week ago, on, to-wit, April 24, 1919, he sent his agent out to said farm to make some repairs on the buildings, as he had a prospective purchaser, whom he expected to take out there the following day, and that when his agent returned to town he reported to this plaintiff that one Francis M. Byers, was in possession of said farm, had moved in the dwelling house and was plowing and said Byers, who is also made a defendant herein, informed plaintiff's agent, when questioned about what he was doing there, that he had purchased said farm of said Louis P. Ohler; that he had been there at that time, for about two weeks; that he had a deed of said property and had paid said Louis P. Ohler the sum of forty-two hundred (\$4200.00) dollars for said farm, and in addition thereto had assumed a mortgage on said farm, given, as plaintiff believes, by said Ohler and wife of twenty-two hundred (\$2200) dollars, making the total purchase price of the same the sum of sixty-four hundred (\$6400.00) dollars.

VI. Plaintiff alleges, upon information and belief, that at the time said Louis P. Ohler and wife made the contract of said farm to said Andrew D.

and Lucy Boomsma, as hereinbefore stated, that said farm was encumbered by mortgage in the sum of \$2200.00 but said \$2200.00 was included in said contract price of \$6000.00.

VII. Plaintiff further alleges that by the terms of said contract, the interest was due thereon semi-annually, and that the interest had not been paid by this plaintiff, which became due on the 1st day of February, 1919, and this plaintiff alleges that as soon as he learned of the pretended sale of said farm by the said Louis P. Ohler and his wife, to the said Francis M. Byers, and on, to-wit, the 28th day of April, 1919, he went to the place of business of said Louis P. Ohler, in the village of Jennison, and made him a legal tender of the interest that was due on the said 1st day of February, together with the interest on the same to the date of said tender and also at the same time tendered to said Louis P. Ohler the sum of one and 10/100 dollars, to cover the costs of the service of a notice which had, a few days previous, been served on him by Clark B. Gleason, as attorney for said Ohler, and plaintiff hereby, for the purpose of keeping said tender good, pays the clerk of this court the amount of said tender, said notice purporting to terminate plaintiff's tenancy in said land and to declare his interest forfeited.

VIII. Plaintiff further alleges and expressly charges the truth to be, that the said Louis P. Ohler and Agnes A. Ohler, and the said Francis M. Byers, who claim that they have sold said land, and purchased the same, that the said Byers, if he did purchase said land, purchased it with full knowledge of the contract interest of the said plaintiff and that said pretended sale was a mere sham and fraud and made for the purpose of cheating and defrauding this plaintiff out of his interest in said land.

IX. Plaintiff further alleges that by virtue of Act No. 91 of Public Acts of Michigan for the year 1911, it expressly provided that a tax of 50 cents on each \$100 due and unpaid on a land contract should be paid to the county treasurer of the county where said lands were situated, and that until the said sum was paid, the holder of said contract could take no steps to foreclose said contract, or to in any way enforce payment of the same until said tax was paid, and plaintiff alleges that at the time of the service of said notice so served upon him by the said Clark H. Gleason that said tax had not been paid by the said Louis P. Ohler, or by anyone in his behalf, and that by reason of such failure to pay said tax, that the service of said notice was a mere nullity and in no way affected the right of this plaintiff in said land.

X. Plaintiff alleges that the said Louis P. Ohler and Agnes A. Ohler, and Francis M. Byers, are conspiring together to cheat and defraud this plaintiff, and this plaintiff fears that unless they and each of them are restrained by the order and injunction of this court, that they may seek to sell and convey said farm to some innocent purchaser, and thus render it more difficult for this plaintiff to recover possession of said farm. For as much as this plaintiff is without remedy in the premises except in a court of equity, this plaintiff prays:

(a) That the said Louis P. Ohler, Agnes A. Ohler and Francis M. Byers, who are made party defendants to this bill, make full, true and direct answer to the same, but not under oath (their answers under oath being hereby waived).

(b) That the pretended forfeiture, claimed by the said Louis P. Ohler and Agnes A. Ohler against this plaintiff of said contract, be set aside and held for naught, and that this plaintiff be allowed to proceed with the execution of said land cotract so assigned to him, as hereinbefore stated.

(c) That the said Louis P. Ohler and Agnes A. Ohler be decreed to accept at the proper time and in the proper manner of the performance of said contract by said plaintiff according to its terms.

(d) That the said Louis P. Ohler and Agnes A. Ohler and Francis M. Byers may be restrained by the order and injunction of this court, from in any manner selling, mortgaging, or disposing of plaintiff's interest in said land and premises until the further order and direction of this court.

(e) That any deed that may have been executed by the said Louis P. Ohler and Agnes A. Ohler to the said Byers, of said premises, be set aside, or if it shall be determined by this court that an actual sale was made to the said Byers in good faith on his part, and for a valuable consideration, without notice of the rights of plaintiff therein, then said plaintiff prays that an accounting may be had between himself and the said Louis P. Ohler and Agnes A. Ohler as to the amount of the equity of plaintiff in said lands, and that the said Louis P. Ohler and the said Agnes A. Ohler be decreed to pay to this plaintiff such a sum as plaintiff's equity may be in said land.

(f) And that said plaintiff may have such other and further relief in the premises as equity may require and as to this court may seem meet.

And plaintiff will ever pray, etc.

JEREMIAH C. HUBBELL,
HARTLEY E. HENDRICK,

Attorney for Plaintiff,
208 Houseman Bldg.,
Grand Rapids, Michigan.

(Verification.)

(c) Answer to Bill.—(Caption.) The defendants answering say:

1. Defendants Ohler admit the allegation of the first clause of said bill as to the title and ownership of the land therein described and the execution of a contract of sale thereof, and that Exhibit A is substantially a copy thereof. They do not admit the interpretation of said contract is correct as set out in said bill. Defendant Byers has no knowledge sufficient to answer, except the ownership of the land, and that he admits.

2. Defendant Louis P. Ohler admits on information the assignment of the contract, but has no knowledge of the correctness of Exhibit B. The other defendants have no knowledge sufficient to answer.

3. Defendant Louis P. Ohler admits payment of taxes and interest to him at one time, and that he gave a receipt for them, but he has forgotten the date and the name of the party, but he supposes it was plaintiff. The money came to him in checks of Hartley E. Hendrick. The other defendants have no knowledge sufficient to answer.

4. Defendants have no knowledge of the allegations in the fourth clause of the bill.

5. Defendant Byers admits he is in possession of said farm, is living thereon and is working it, and that he bought it and that he told a man who came there recently said facts, but he denies telling him he paid forty-two hundred dollars for it and assumed a mortgage of twenty-two hundred dollars; that he told him he traded a stock of goods for it he once was offered in trade forty-two hundred dollars for, and that it would cost him about four thousand dollars, all told, in trade.

The other defendants have no knowledge, except they admit the sale of said farm to defendant Byers.

6. They admit the allegations of clause six of said bill.

7. Defendant Louis P. Ohler denies that a legal tender of the interest due February 1, 1919, was ever at any time made to defendant by plaintiff. Whether or not he has paid any money into court, he has no knowledge.

The other defendants have no knowledge sufficient to answer.

8. Defendants admit that said Byers purchased said land with knowledge that plaintiff had at one time claimed to have a contract of it, but shows unto the court he was told, when he bought, the contract interest of said plaintiff had been forfeited and was at an end. Defendants show they had no purpose of cheating or defrauding any one, and did not do so.

9. Defendants admit that the statutes provide for a tax as set forth in the ninth paragraph of said bill, but allege that the notice served by said Gleason was not for the purpose of enforcing said contract, but was to forfeit the same, and for that reason the payment of the tax was not a preliminary requisite. They also say the tax is payable before the contract could be assigned, and hence plaintiff has no standing in a court of equity under an assignment of the contract, and no right to enforce it without payment of the tax. If in this they err, they pray to be permitted to pay the tax.

10. Defendants deny all charges of fraud or intent to defraud as alleged in clause ten of said bill, and deny all its charges of conspiring together for any wrongful purpose.

11. And these defendants by way of a cross-bill, allege as follows, viz.:

1. That there has been no one in actual occupation of said farm since it was vacated by said Boomsma until defendant Byers bought it and went into possession. That plaintiff never has been in actual possession of the land. That during all the fall and winter of 1918 and winter and spring of 1919 plaintiff has suffered various and sundry persons to commit waste and damage to the said lands and appurtenances contrary to the

terms of said contract; that people have been there and carried away numerous doors and hinges from the dwelling house, and committed other depredations, and taken the stanchions from the stable in the barn on said premises; that the barnyard fences are gone, and that there are practically no fences on the farm; that he has suffered the farm to grow up to weeds, and the buildings to be destroyed; that the roof of the house and barn leak very badly, so that the plastering has fallen off the house in some places; that the window lights are largely broken out in both the house and barn and things generally in a run-down condition when defendant Byers purchased and took possession.

2. That six months' interest came due on the contract February 1, 1919, and the taxes for 1918 became due in December, 1918, neither of which have been paid; that defendant, Louis P. Ohler, demanded the same several times without avail, and he finally put the same into the hands of C. H. Gleason, his attorney, who notified plaintiff and his attorney of the payments past due, and demanded that they pay them, without avail, and on April 12, 1919, said attorney served a notice on said plaintiff forfeiting the said contract; that attached hereto, marked Exhibit A is a copy of said notice served as aforesaid on plaintiff, April 12, 1919. That there was no one in possession of the farm at the time of the service of said notice, and defendant soon after took possession of said farm, and later sold it to defendant, Byers, in good faith, and had been in undisturbed possession for several weeks when this suit was begun.

3. That defendant Ohler sold said farm for all it was worth in its present condition, and got only about the amount out of it that was due him on the old contract for it. He did not sell the farm to make money, though he sold it for all it was worth in its present condition, but sold it because it was necessary some one go on it to preserve it, and to prevent the buildings from destruction and from being carried away; that defendant Ohler placed the matter in the hands of his attorney, C. H. Gleason, and Mr. Gleason informed him he saw said plaintiff and told him of the condition the farm was in and the need of repairs to the buildings and that the interest and taxes were unpaid, and said plaintiff replied he bought the place against his better judgment, that he traded other encumbered property for it, and that he had only about eleven hundred dollars on it, and would not have traded for it on his own judgment but because of a contract and guaranty he had from Hartley E. Hendrick and William E. DeGolia, of Grand Rapids, Michigan, that he should not lose anything on the purchase and the reason he had not paid the interest and taxes was because they refused to put up their two-thirds thereof, which he expected them to do, inasmuch as they were to share the profits and that he had his one-third of the money ready. He said he had no use for the farm and only bought it because of the guaranty aforesaid that he should make some money out of it, and he would like to get back a part at least of the money it had cost him, but that he would not himself live on the farm, or work it.

4. Defendants further aver that the notice, Exhibit A, legally terminated plaintiff's contract, and inasmuch as they got peaceable possession under it, they can hold possession thereof, and had a right to sell and buy the farm without consent of the plaintiff.

5. Defendants therefore pray:

(a) That said plaintiff may be decreed by this court to surrender and deliver up said contract for cancellation, and that the same be cancelled.

(b) That they may have such other and such further relief as the nature of the case may require.

(c) That plaintiff may be required to answer this cross-bill, but not under oath, his answer under oath being waived.

C. H. Gleason,
Attorney for Defendants and
Cross-Plaintiffs.

Louis P. Ohler,
Agnes A. Ohler,
Francis M. Byers,
Defendants.

(d) Answer of Plaintiff to the Cross-Bill of Defendants.—(Caption.) This plaintiff, saying and reserving to himself all right of exception to said cross-bill, for answer says:

1. Answering paragraph one of said cross-bill of complaint, plaintiff admits that he did not actually live upon the farm in question after it was vacated by the said Boomsma, but he denies that he has not been in actual possession of the land. He denies further that various and sundry persons have committed waste or damage to said land and buildings, but admits that the said buildings were not and for some time prior to plaintiff's purchase, had not been in good condition.

Further answering said paragraph, plaintiff says that on the day that he learned the farm had been sold to the defendant, Byers, plaintiff had sent an agent out to said premises to repair the roof of the house and barn and make other improvements. Plaintiff denies said farm had grown up to weeds and says that said farm and said crops growing thereon, when the purchase was made, were cared for and harvested by plaintiff.

2. Answering paragraph two, plaintiff admits that six month's interest became due on the contract February 1st, 1919, and says that at that time Hartley E. Hendrick, an attorney of Grand Rapids, Michigan, who was then acting as attorney for plaintiff had funds of plaintiff's in his possession and had been instructed to pay said interest and that plaintiff did not know until after the sale had been made to said Byers that that said interest had not been paid by his said attorney, nor did he know that the 1918 taxes, due in December, had not been paid; and plaintiff denies that the defendant, Louis P. Ohler, demanded the same several times, but he admits that a so-called notice forfeiting said contract, was served upon him after the defendants, Ohler, had made the said sale to the said Byers, whether or not said defendants have a copy of said notice plaintiff does not know, as defendants failed to attach a copy of the same to their cross-bill, as therein alleged.

Further answering said paragraph, plaintiff denies that said sale was made in good faith, but he admits that the said Byers had been in possession for several weeks when this suit was started.

3. Answering paragraph three, plaintiff denies that the said Ohler got out of said farm only what was due him, as plaintiff had an equity of a large amount, to-wit, \$3500.00 and upwards, in said property. He denies that it was necessary to make a sale to preserve said property, and charges the truth to be that he seized the slightest pretext possible as a basis for a so-called or alleged forfeiture of said contract; that said defendant might again sell said property for a large amount and to keep and retain the amount paid in by plaintiff and his assignor.

Further answering said paragraph he denies each and every allegation therein contained, excepting that he did state to Mr. Gleason, that his attorney, Mr. Hendrick and his agent, Mr. DeGolia, were endeavoring to sell said property, and had a sale practically consummated at the time plaintiff learned defendants had sold said property to the said Byers.

He admits that he stated to Mr. Gleason that Mr. Hendrick and Mr. DeGolia assured plaintiff he would not lose anything on the purchase, and that he ought to make some money on it. He admits that he stated he would not live on the farm as he is employed as a laborer in a furniture factory in Grand Rapids; that he is a single man well along in years, and that a large part of the savings of a lifetime have been invested in said premises. He denies that he said that he had purchased the place against his better judgment; that he had a guarantee from anyone he would not lose anything on the purchase. He denies that he said he had no use for said farm, but admits that he told Mr. Gleason he would like to get his money out of it.

4. Answering paragraph four, he neither admits nor denies that the notice, Exhibit A, legally terminated his contract, as there is no Exhibit A attached to said cross-bill. Plaintiff, however, denies that any notice legally terminated his contract, and denies that defendants can hold possession of said property; denies that they had a right to sell, buy or deal said property without plaintiff's consent, and for further answer says that the whole transaction is a wilful, deliberate fraud upon the rights of plaintiff, is unjust, unequitable and is but an attempt to legally steal from plaintiff his rights in said property. Further answering, plaintiff reiterates that he made a legal tender of the interest due and was ready to pay any taxes due, had his tender been accepted, and was and now is ready and willing to pay to defendants, or any of them, anything he owes, or anything the court may find plaintiff owes to defendants.

And plaintiff denies that defendants, or any of them, are entitled to the relief prayed for in their cross-bill of complaint, or to any relief in the premises, and prays that the same may be dismissed with his costs.

John M. Dunham,
Attorney for plaintiff,
Business Address:

Jeremiah C. Hubbell,

(e) The Contract Involved—(Exhibit B).—This contract, made the 29th day of June, in the year of our Lord one thousand nine hundred seventeen, between Louis P. Ohler and Agnes A. Ohler (husband and wife), of Jennison, Ottawa County, Michigan, parties of the first part, and Andrew D. Boomsma and Lucy Boomsma (husband and wife), of Holland, Ottawa County, Michigan, parties of the second part, witnesseth as follows:

First. The said parties of the first part, in consideration of the sum of money hereinafter mentioned to be paid to them by the said parties of the second part, and of the covenants to be performed by the said parties of the second part, as hereinafter expressed, hereby agree to sell to the said parties of the second part, all that certain piece or parcel of land situate in the township of Wyoming, County of Kent, State of Michigan, known and described as follows:

The east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section fifteen (15) in township six (6) north, range twelve (12) west, except nine and one-half ($9\frac{1}{2}$) acres in width from the west side thereof and except parcel conveyed in deed recorded in liber 399 of deeds, on page 578, with the privileges and appurtenances thereunto belonging.

Second. The said parties of the second part, in consideration of the covenants herein contained on behalf of the said parties of the first part to be performed, agree to purchase of the said parties of the first part, the above described land and to pay for the same to the said parties of the first part, or their legal representatives, the sum of six thousand dollars, lawful money of the United States, in the manner following, that is to say: (on the margin appeared, "Three thousand dollars by transferring a house and several lots in Holland to first parties by second parties, the balance"), one hundred dollars or more each year on August, commencing August 1, 1919. Interest on the whole amount to commence August, 1917. First parties to give second parties a warranty deed of above premises when one thousand dollars has been paid on the principal and take mortgage for the balance, with interest at the rate of six per cent. per annum, payable semi-annually, on the whole sum that shall from time to time remain unpaid; both principal and interest to be paid at Jennison, Michigan, and also, that they will, so long as any part of the principal or interest of the said consideration money remains unpaid, well and faithfully, in due season, in each and every year, pay, or cause to be paid, all taxes and assessments, ordinary and extraordinary, that may for any purpose whatever be levied or assessed on said premises, or on this contract, or the interest in said lands created or represented by this contract, and that they will not commit or suffer any other person to commit, any waste or damage to the said lands or the appurtenance, except for firewood or otherwise for their own use or while clearing of the lands for cultivation in the ordinary manner.

Third. The said parties of the first part further covenant and agree that upon the faithful performance, by the said parties of the second part, of the covenants and agreements by them to be performed, and upon

the payment of the several sums of money above mentioned, and the interest thereon at the times and in the manner and at the place above mentioned, the said parties of the first part will well and faithfully execute and deliver a good and sufficient deed or deeds of, and thereby convey to the said parties of the second part, their heirs and assigns, a good and unencumbered title in fee simple to the above described premises with their appurtenances.

Fourth. It is mutually covenanted and agreed, by and between the parties hereto, that the said parties of the second part, may immediately enter on said land, and remain thereon and cultivate the same as long as they shall fulfill and perform all the agreements hereinbefore mentioned on their part to be fulfilled and performed, but if they shall at any time hereafter, violate or neglect to fulfill any of said agreements, they shall forfeit all right or claim under this contract, and be liable to said parties of the first part for damages, and shall also be liable to be removed from said land in the same manner as is provided by law for the removal of a tenant that holds over after the expiration of the time specified in his lease. And it shall be lawful for the said parties of the first part, at any time after the violation or non-fulfillment of any of the said agreements on the part of the said parties of the second part, to sell and convey the said land, or any part thereof, to any other person whomsoever; and the said parties of the first part shall not be liable in any way, nor to any person, to refund any part of the money which they may have received on this contract, nor for any damages on account of such sale. And it is hereby expressly understood and declared, that time is and shall be deemed and taken as of the very essence of this contract, and that unless the same shall, in all respects, be complied with by the said parties of the second part at the respective times, and in the manner above limited and declared, that the said parties of the second part shall lose and be debarred from all rights, remedies or actions, either in law or equity, upon or under this contract.

Fifth. This contract is hereby declared to be binding on the respective representatives of the parties hereto.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

Louis T. Ohler	(L. S.)
Agnes A. Ohler,	(L. S.)
Andrew D. Boomsma,	(L. S.)
Lucy D. Boomsma.	(L. S.)

Signed, sealed and delivered in presence of

(f) Transfer of the Contract to the Plaintiff Hubbell—(Exhibit C).—
Grand Rapids, Michigan, Aug. 1, 1918.

For value received, to-wit, in the transfer of lot 27 of J. Aldrich Smith's subdivision of lots 39 to 58, both inclusive, of P. Tregent's subdivision of lots 6, 7, 8, 9, 10, 11, 12 and 18 of P. Tregent's subdivision in the City of Grand Rapids, Kent County, Michigan, according to the recorded plat thereof (same being 831 Arianna street in said

city) subject to a mortgage of eight hundred (\$800.00) dollars and accumulated interest from February 7th last, together with the sum of two hundred twenty (\$220.00) dollars, for the purpose of paying the interest on the contract hereinafter mentioned and described to this date, together with the taxes thereon for the year 1917.

I do hereby sell, assign, transfer, and make over to Jeremiah C. Hubbell all my right, title, and interest in and to a certain land contract dated the 29th day of June, 1917, given by Louis P. Ohler and Agnes A. Ohler to Andrew D. Boomsma and Lucy Boomsma, husband and wife, and the said Lucy Boomsma having departed this life since making of said contract. Said contract conveying that certain piece or parcel of land situate in the township of Wyoming, County of Kent and State of Michigan, known and described as follows, to-wit:

The east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section fifteen (15) in township six (6) north, range twelve (12) west, except nine and one-half ($9\frac{1}{2}$) acres in width from the west side thereof, and except a parcel conveyed in deed recorded in liber 399 of deeds, on page 578. Said party to have immediate possession of said property and all crops growing thereon, and after the payment of the interest and taxes as above provided, is to take said land subject to the three thousand dollars to become due on said contract.

In witness whereof I hereunto set my hand and seal the day and year first above written.

I hereby represent that I am single at this time and am the entire owner of said property, subject only to the interest of the grantors in said contract.

Andrew D. Boomsma.

Signed in presence of:

Hartley E. Hendrick,

Wm. E. DeGolla.

(g) Notice of Forfeiture—(Exhibit A).—Jeremiah C. Hubbell, Esq., Assignee of Andrew D. Boomsma and Lucy Boomsma, City.

Dear Sir: Please take notice that default has been made in the terms and conditions of a land contract dated June 29th, 1917, given by Louis P. Ohler and wife, Agnes A. Ohler, to the said Boomsma and wife, and that you have violated and neglected to fulfill the agreements therein contained and that we have elected to declare and do declare the said contract forfeited and all your rights and claims thereunder at an end, and you are hereby notified to quit and surrender up the said premises to us. The premises referred to are described in said contract as "All that certain piece or parcel of land situate in the township of Wyoming, County of Kent, State of Michigan, known and described as follows:

"The east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section fifteen (15) in township six (6) north, range twelve (12) west, except nine and one-

half ($9\frac{1}{2}$) acres in width from the west side thereof and except parcel conveyed in deed recorded in liber 399 of deeds, on page 578."

Dated April 12, 1919.

Yours, etc.,

Louis P. Ohler, and

Agnes A. Ohler,

Owners,

By Clark H. Gleason,

Their Agent and Attorney

(h) Decree.—(Caption). At a session of said court held at the court house in the City of Grand Rapids, in said county, on the 28th day of January, A. D. 1920.

Present: Hon. John S. McDonald, circuit judge.

This cause came on to be heard upon the bill of complaint filed therein, the answer and cross-bill of defendants, the answer of said plaintiffs to said cross-bill, and the proofs taken in open court, and the arguments of counsel for the respective parties from which the following facts satisfactorily appear, viz.:

1. Defendants Louis P. Ohler and Agnes A. Ohler were the owners in fee of land situate in the township of Wyoming, County of Kent, State of Michigan, known and described as follows: The east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section fifteen (15) in township six (6) north, range twelve (12) west, except nine and one-half ($9\frac{1}{2}$) acres in width from the west side thereof and except parcel conveyed in deed recorded in liber 399 of deeds, on page 578.

2. That said defendants sold the said land on land contract to one Boomsma and wife, June 29th, 1917, taking in part payment therefor certain encumbered real estate and leaving a balance of \$3000.00 unpaid, the first payment on the principal being \$100.00, due Aug. 1, 1919, and yearly thereafter, all unpaid to bear interest from August 1, 1917, payable semi-annually at six per cent. That by said contract said Boomsma and wife agreed to pay all taxes on the lands when due; that they would not commit or suffer any other person to commit any waste or damage to said land while the purchase price was unpaid, and that if at any time thereafter they should violate or neglect to fulfill any of said agreements, they should forfeit all right or claim under the contract and be liable to be removed from the said land in the same manner as is provided by law for the removal of a tenant that holds over after expiration of the time specified in his lease. Said contract also provided after the violation of any of said agreements on the part of said second parties, it should be lawful for first parties to sell and convey the said land to another without being liable in any way for any damages on account of said sale, and it was expressly understood and declared that time is and shall be deemed and taken as of the very essence of this contract, and that failure to comply with any of its conditions in time and manner therein provided for would cause second parties to lose and be debarred from all actions at law or in equity upon or under the contract.

3. That afterwards, on August 1, 1918, said Boomsma sold and assigned said contract to the plaintiff in this cause, Jeremiah C. Hubbell. Said Hubbell bought the land on a speculation without intending to occupy it and he did not occupy it, and the house and barn and land remained vacant.

The taxes of 1918 amounting to \$48.97, said Hubbell at no time paid, and six months' interest on the \$3000.00 unpaid on the contract became due February 1, 1919, which he also failed to pay. He also suffered various and sundry people to commit waste and damage to said lands and the appurtenances particularly the house and barn.

4. Defendants Ohler, after making several attempts to collect of plaintiff the interest and taxes in arrears without success, placed the matter in the hands of their attorney who demanded the interest and taxes of both plaintiff and his attorney, and, failing to get the money, on April 12, 1919, they caused a written notice to be served on plaintiff, forfeiting the contract, and declaring all plaintiff's rights thereunder at an end.

5. On April 23, 1919, defendants Ohler, sold and conveyed said land to defendant Byers, for a valuable consideration in good faith, and defendant, Byers, bought the same in good faith, and at once took possession of the land and has since lived upon it.

It thus appearing to the court that the bill of complaint filed in the cause by plaintiff is without equity, that all of plaintiff's rights in the land described in said bill have been terminated, and the contract under which he held forfeited and at an end, and that said contract should be cancelled according to the prayer of defendants' cross-bill, on motion of C. H. Gleason and A. A. Ellis, attorneys for defendants, it is ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge and decree as follows, viz.:

1. That said plaintiff take nothing by his bill.
2. That said plaintiff do surrender and deliver up to defendants, Louis P. Ohler and Agnes A. Ohler, said land contract to be cancelled, and that it stand cancelled and have no further force or effect.
3. That the deed of said land made by defendant, Ohler and wife to defendant, Byers, stand confirmed as valid deed.
4. That defendants recover of plaintiff the costs of this suit to be taxed.

John S. McDonald,

Circuit Judge.

Examined, countersigned and entered by me.

Edward L. Wagner,

Deputy Clerk.

(i) Briefs of Counsel, John M. Dunham, for Plaintiff.

1. Specific Performance. Specific performance of a land contract is like the specific performance of any other kind of contract. It is not granted as a matter of right, but rests in the sound discretion of the court. *Tatten v. Bryant*, 198 Mich. 523.

It has therefore been held that each case must rest upon its own peculiar facts, so that the court, while doing justice to one, will work no injustice to others. The delay of many years in bringing such action may work such injustice as to compel a refusal of this remedy. *Cook v. Stafford*, 86 Mich. 163.

2. Time is the essence of this contract. *Morris v. Hoyt*, 11 Mich. 9; *Richmond v. Robinson*, 12 Mich. 193.

3. That the vendor cannot stand entirely upon the provisions of his contract. *Bomier v. Caldwell*, 8 Mich. 463; *Truesdail v. Ward*, 24 Mich. 117; *Kimball v. Goodburn*, 32 Mich. 10.

4. The failure to perform within the time fixed will not necessarily forfeit a contract. Relief is not a matter of right. It is granted only if, under all circumstances including the conduct of the parties, it is just and reasonable. *Gram v. Wasey, et al.*, 45 Mich. 223.

The delay of a few days has been held immaterial, giving the plaintiff a clear right to specific performance. *Voltz v. Grummett*, 49 Mich. 453.

In a number of other cases the court has granted specific performance on the sole condition that plaintiff be required to pay what was due with compound interest. *Richards v. White*, 44 Mich. 622.

The plaintiff, *Hubbell*, tendered interest upon interest before filing this bill, and kept his tender good by paying same to the clerk of the Circuit Court.

5. Foreclosing Contract. Without some legal procedure, the equitable rights of the vendee in a contract, cannot be said to be cut off. In *Lambton Loan & Investment Company v. Adams*, 132 Mich. 350, it is said that three methods are open to the vendor when the vendee fails to make his contractual payments: (1) a suit in equity to foreclose the vendor's lien or cancel the contract; (2) the legal action of ejectment; (3) proceedings under the statute before the Circuit Court Commissioner. *Ohler* did none of these.

In *Miner v. Dickey*, 141 Mich. 518, the defendant did not pay the taxes even after plaintiff had demanded that he so do. No further notice nor demand of any kind was made before plaintiff began summary proceedings. On appeal to the Circuit Court, a verdict was directed for plaintiff which was affirmed by this court. *Welling v. Strickland*, 161 Mich. 235.

The vendor in a contract has conveyed the equitable title to his vendee. He has a lien against the land only for the unpaid purchase price. In *Fitzhugh v. Maxwell*, 34 Mich. 138, it is held that a court of equity has no jurisdiction to enforce a forfeiture. The English practice required a sale to satisfy his lien, on the theory that the vendee's title, either legal or equitable can only be divested by a sale. See also *Kulling v. Kulling*, 124 Mich. 56.

6. Notice of Forfeiture. There must be some notice of forfeiture. *La France v. Griffin*, 160 Mich. 236.

This notice should give a time for payment or redemption. At any rate, the vendee must offer to pay within a reasonable time. *Hogsett*

v. Ellis, 17 Mich. 351; Lavin v. Lynch, 203 Mich. 143; Walker v. Casgrain, 101 Mich. 604.

Pomeroy's Eq. 4th Ed. Sec. 816. The form of action is sustained by many authorities. We refer to the recent case of Schoenfeld v. Kemter, 211 Mich. 464, where the relief, however, was not granted. In Gregor v. Olde, 209 Mich. 43, Justice Steere, writing the opinion of the court, said:

"That equity courts have jurisdiction to relieve from forfeitures, direct accounts, and grant specific performance where equitable grounds to those ends are properly charged and satisfactorily proven, is textbook law and not open to question."

And we refer especially to the case of Lozon v. McKay, 203 Mich. 364, where a bill drawn in substantially the same manner as the one in this case, was upheld, and the plaintiff relieved from forfeiture.

It follows, therefore, from the equities of this case, the diligence and the good faith of plaintiff, the undue haste of the defendants, their conduct and actions, their motives, the profit Ohler made from the resale, the small equity he had in the farm, the large equity of plaintiff, together with all other circumstances, that plaintiff is entitled to relief. If the sale to Byers was made in good faith, then he is entitled to an accounting which, in our judgment, should give him the value of his equity, less the taxes paid by Ohler the summer following the sale to Byers, which would be \$3,200 less \$52.89 (\$4).

In Hawley v. Sheldon, et al., Harrington's Chancery, page 420, specific performance was refused but such an accounting was directed.

7. Waste. We believe there is no merit to defendant's claim of waste. This consisted of allowing the roof to get out of repair and water to leak down. Damage of this kind, due to the elements or to natural wear and tear, is never treated by the law as waste. They claim that some doors had been taken out of the house and some stanchions out of the barn, and that these things happened because Hubbell was not living on the place to watch it. Ohler did not know of these things, however, until after he had declared a forfeiture. This element is injected into the case simply as an alibi. He also claims that waste was committed because the fences were not kept in proper condition, but Boomsma, the former owner, testified: "The fences around the barn were awful bad."

It is said in Pomeroy's Equity, Fourth Edition, Section 857:

"The vendor's only interest in the use of the land he has contracted to sell is to have his security unimpaired so that it may satisfy the unpaid purchase price. The vendee in possession is entitled to make any use of the property so long as he does not materially affect its value as security for the purchase money. In order that the vendor may have an injunction to prevent waste, he must show that the vendee is lessening the value of the land so as to impair his security, and thus to injure his property—the security. The analogy to the mortgage is close. Mortgagee cannot maintain an action to restrain waste without showing that his security will be impaired."

No such showing was made in this case. Ohler had ample security. His equity was then not over \$800.00 and he himself testified that the thing he complained of was the nonpayment of interest and taxes, and that he tried to forfeit the contract because of those. He had not been on the place at that time. This case is wholly unlike *Welling v. Strickland*, *supra*, and proposition, therefore, has no merit and needs no further discussion.

8. Defendant Byers was not a bona fide purchaser of this property, in good faith.

Pomeroy's Eq. 745, definition there set out.

Authorities Cited by Defendant

(j) Brief for Defendant.—1. Specific performance is not a matter of right. It should only be granted when justice demands it. *Ruse v. Conrad*, 47 Mich. 449; *Cox v. Raider*, 138 Mich. 249; *Solomon v. Shewitz*, 185 Mich. 620.

Defendant Ohler in forfeiting the contract and taking possession and selling the land was strictly within the contract and his legal rights. Mr. Ohler had a right to at once, after giving notice to Hubbell that he declared the contract forfeited, to take peaceable possession of the premises. *Murphy v. McIntyre*, 152 Mich. 591, and many cases cited.

It was not necessary for defendant Ohler to bring suit after Hubbell had forfeited the contract and the contract was declared forfeited and notice given to get possession. He got possession peaceably and had the right to take it. *Donnelly v. Lyons*, 173 Mich. 520.

In this case the placing of one sign only was not sufficient.

Where the premises are vacant and no personal occupancy, there could be no necessity for bringing a possessory action.

As to when equity will relieve from forfeiture, *Lozon v. McKay*, 203 Mich. 366.

As to when a contract will be enforced, *Lake Erie Land Co. v. Chilinski*, 197 Mich. 215.

Defendant might have taken possession immediately after declaring contract forfeited. *Patterson v. Hogstein*, 183 Mich. 470.

That time may be essential where the parties so stipulate, *Pomeroy's Eq. Jur. Sec. 816*; *Heckard v. Sayre*, 34 Ill. 142, holding that neither a court of law nor equity can set aside a stipulation that time is the essence of a contract unless there is fraud or deceit of some kind.

In *Nelson v. Smith*, 161 Mich. 363, delays and favors by grantor greater than in the case at bar, were held not to be fatal to relying upon time as of the essence of the contract, and enforcing the forfeiture. The head note reads as follows:

"Evidence that the vendor in a contract for the sale of land attempted to assist the purchaser, whose payments were overdue, in finding a loan, and that the purchaser, after being in default three months, wrote letters advising the vendor that he had found a person who would loan him sufficient money to pay the amount due, and that the vendor had said he could

fix matters up so neither party would lose much, is not sufficient to establish a waiver or estoppel to enforce a forfeiture for the default."

In the above case, the purchaser had made improvements; in this case, the purchaser had allowed waste and failed to pay the taxes.

In *Jones v. Berkey*, 181 Mich. 473, the contract was like the one at bar as to time. The case was from Kent Circuit, tried by Judge Brown. The head note covers the holding:

"While, as a general rule, time is not of the essence of a contract to pay money, though the time for payment be fixed, and a declaration of such intention is not conclusive, yet, where the requirement is reasonable, and the circumstances give occasion for it, the parties may properly stipulate that the provision relative to the time of installments to be paid upon a land contract shall be of the essence." and cited *Richmond v. Robinson*, 12 Mich. 193. It then quotes:

"If time is of the essence, a performance after the time fixed does not bind the other party unless he waives the breach, and thereby, in effect, makes a new contract taking the place of the old one." *Clark on Contracts* (2nd Ed.) Sec. 233.

The opinion further quotes and says:

"Nothing short of an offer of everything that the creditor is entitled to receive is sufficient, and a debtor must at his peril tender the entire sum due, including all necessary expenses incurred, or damages suffered by the creditor by reason of the default of the debtor." Citing 38 Cyc. p. 137.

A party seeking relief against a forfeiture should tender sufficient to make the other party whole. *Stickney v. Parmenter*, 35 Mich. 237

The general rule is well stated by Judge Sanborn in *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623, citing many authorities:

"He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform."

And the case holds: "After default and resale to a third person, the defendant was entitled to have a sufficient sum tendered to include necessary costs and expenses arising from the undisputed default; to offer merely the payment provided for by the terms of the agreement was insufficient as a foundation for an action for damages.

The difference is pointed out in *Miller v. Havens*, 51 Mich. 482. The head note is as follows:

"Forfeiture clauses in a lease are not favored by the courts, and their effect will be restricted as far as possible; when the lease explicitly provides that the landlord may treat it as void upon breach of condition by the tenant, his election to do so dissolves the relation between him and his tenant."

The doctrine there announced is firmly established in a case where the Supreme Court adopts the opinion of the lower court, which is very exhaustive and cites the authorities of many states, all to the same

effect. That case is *DeGrasse v. Verona Mining Company*, 185 Mich. 514. We quote from page 537:

"Assuming that a covenant to operate the property may be implied, and that the Verona Company failed to perform such implied covenant, yet the right to forfeit the lease would not follow. The right of forfeiture is confined to the failure of the lessee respecting the covenants and conditions which are expressed in the lease and does not arise upon the non-observance of an implied covenant or condition."

2. Fraud is not to be presumed, but must be proved. (1873) *Robert v. Morrin's Estate*, 27 Mich. 306; (1877) *Cranson v. Smith*, 37 Mich. 309, 26 Am. Rep. 514; (1883) *Brown v. Dean*, 52 Mich. 267, 17 N. W. 837; (1884) *Edwards v. Edwards*, 54 Mich. 347, 19 N. W. 164; (1907) *Raymond v. McKenna*, 147 Mich. 35, 110 N. W. 121, 13 Detroit Leg. N. 935.

Fraud is not presumed, and it is not ordinarily necessary to negative it until some proof is offered tending to show it. *Attorney General v. Ruggles*, 59 Mich. 123, 26 N. W. 419.

3. "Waste is whatever tends to the destruction of the inheritance or to its depreciation in value, and may be committed, of land as well as in houses and timber." *Wilds v. Layton* (1 Delaware Ch. 226).

"The impoverishment of fields, by constant tillage from year to year is waste." *Sarles v. Sarles, et al.*, Vol. 3 Sanford's Chancery Reports, 601.

CHAPTER XI

FORECLOSURE OF VENDOR'S LIEN PLEADING AND PRACTICE

- § 186. Foreclosure by Vendor, Nature of Action.
- § 187. What Actions are Waived by Pursuing Remedy of Foreclosure.
- § 188. Pursuing Foreclosure and Action at Law for Purchase Price Concurrently.
- § 189. Foreclosure of Land Contract—Bill of Complaint Form.
- § 190. Decree of Foreclosure—Form.
- § 191. Commissioner's Deed on Foreclosure Sale.
- § 192. Notice of Sale by Circuit Court Commissioner—Form.
- § 193. Affidavit of Posting Notices of Sale—Form.
- § 194. Circuit Court Commissioner's Report of Sale—Form.
- § 195. Exhibit C—Statement of Fees and Disbursements by Circuit Court Commissioner on Sale.
- § 196. Forms of Receipts From Circuit Court Commissioner.
- § 196A. Pleadings and Briefs Used in Late Michigan Cases in the Foreclosure of Vendor's Liens.

§186. Foreclosure by Vendor, Nature of Action.—Strictly speaking the vendor's interest in the property sold under a land contract under which possession has been given to the vendee is not a legal estate nor has the vendor a lien on the property as security for the purchase price. His interest is a mere equitable charge on the land which can be established as a lien by judicial decree and is foreclosed in proceedings which are in many respects analogous to the foreclosure of mortgages.¹

Said the Michigan Supreme Court in one case with reference to the nature of the vendor's interest, "while at law the title remains in the vendor, yet in equity the contract conveys it to the vendee and the only principle which allows the vendor to sue for his money and at the same time seek security against the land, is the one which recognizes the analogy to the vendor's lien," in cases where the legal title has been conveyed. The title of the vendee whether legal or equitable can only be divested by sale.²

1. Pomeroy Equity Jurisprudence,
Vol. 3, Sec. 1260.

2. Fitzhugh v. Maxwell, 34 Mich.
178.

In another case the court said the claim of the vendor is but an ordinary money debt, secured by the contract.³

In equity, the action to enforce the so-called lien is an action to compel the vendee to make a payment of the purchase price within a specified time or else be barred of all rights under the contract. It is common to speak of the interest of a vendor and vendee under a land contract as being analogous to the interest held by mortgagee under a mortgage, but this is not an accurate use of the terms, as the vendor has the complete legal title and the vendee cannot defeat such title by any act or transfer even to or with a bona fide purchaser.⁴

Foreclosure proceedings in relation to land contracts are not governed by the statutory provisions relating to the foreclosure of mortgages.⁵

The time given for the vendee to redeem by paying up all arrearages on the contract is usually short, thirty to sixty days from the date of the decree, failing in which the decree provides for a sale of the premises, and immediate possession by the purchaser.⁶

The decree usually provides that the defendant who was the original vendee on the contract shall pay any deficiency between the selling price of the premises and the contract price.⁷

The property should be advertised by the commissioner for the same length of time and in the manner provided for the sales of property under mortgage foreclosure.⁸

3. Walker v. Casgrain, 101 Mich. 608.

4. Jones v. Bowling, 117 Mich. 288 (292); Bowen v. Lansing, 129 Mich. 117.

5. Jones v. Bowling, Supra.

6. Jones v. Bowling, Supra. Holding that foreclosure proceedings in relation to land contracts are not governed by the limitation imposed by statute in relation to proceeding in the foreclosure of mortgages.

7. Schmide v. Gaukler, 156 Mich. 243.

8. Jones v. Bowling, Supra. As

to the sale of mortgage premises Compiled Laws, Sec. 12683, provides that such sale shall be at public vendue between the hours of nine o'clock in the morning and the setting of the sun, at the court house or place of holding the Circuit Court in the county in which the real estate or some part thereof is situated, or at such other place as the court shall direct. Circuit Court Rule 58, Sec. 5, provides that sales under decrees of foreclosure shall not be ordered on less than six full weeks, or forty-two days'

Where the vendor effects a sale of the premises upon which a land contract is outstanding, it is a general rule that the party to whom such vendor sells will be subrogated to all the rights of the vendor with respect to the land in question. While he succeeds to all the rights of the vendor in the property thus conveyed, either as to foreclosure of the vendor's lien or other remedies, he also takes it subject to all the equitable rights of the original vendee and usually equity will compel him to specifically perform the contract in the same manner as the original vendor.⁹

Before the vendor can maintain any action against the vendee in foreclosing the contract it is necessary that the vendor himself must not have been guilty of any substantial breach of such contract, as it is a well settled principle of law that he who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform.¹⁰

Where the vendee has conveyed his interest in the property or has leased the same, all such parties in interest should be made parties defendant in the action of foreclosure.¹¹

It may farther be noted in this connection that the vendee has an equitable charge on the real estate covered by the contract of purchase, which is a counterpart of the vendor's so-called lien as security for the purchase money the vendee has paid and for the performance of the vendee's obligation to convey, which can be enforced in exactly the same manner by foreclosure as the vendor's so-called lien.¹²

notice, and publication shall not commence until the time fixed by decree for payment has expired, nor within six months after commencement of suit.

9. Gates on Real Property, Sec. 615-B. 26 Am. & Eng. Encyc. of Law 26; see also 11 Warvelle on Vendors, Sec. 735; Jackson v. Groat (N. Y. 1847), 7 Cow. 285; Haughwont v. Murphy, 22 N. J. Eq. 531; Ohio River Junction R. Co. v. Pa. Co., 222 Pa. 573, 72 Atl. 271; Farady Coke Etc. Co. v. Ownes, 26 Ky.

Law Rep. 243, 80 S. W. 771; Mueller v. Nortman, 116 Ill. 468. 96 Am. St. Rep. 997, 93 N. W. 539.

10. Jones v. Berkey, 181 Mich. 472; Boone v. Perrigo, 217 Mich. 47.

11. Schmidt v. Gaukler, 156 Mich. 243.

12. Pomeroy's Equity Juris. Sec. 1263; Felkner v. Tighe, 39 Ark. 357; Stults v. Brown, 112 Ind. 370, 2 Am. St. Rep. 190, 14 N. E. 230; Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75; Ellison v. Branstrattor, 45 Ind. App. 307, 88 N. E. 963, 89

§ 187. What Actions are Waived by Pursuing Remedy of Foreclosure.—Since the remedy by foreclosure of the vendor's lien, so-called, affirms the existence of the contract and seeks to collect the purchase price by a sale of the vendee's interest in the premises, an action in foreclosure will waive the benefit of the vendor's prior notice of forfeiture by default in the payment and thereafter the vendor cannot pursue any action which is predicated upon the assumption that the contract has been terminated.¹³

§ 188. Pursuing Foreclosure and Action at Law for Purchase Price Concurrently.—It appears to be the well established rule that the vendor may sue in equity to enforce the contract and also at law to recover the debt which the vendee has contracted to pay by the contract or both remedies may be pursued concurrently so long as the vendor retains the title and clearly manifests his intention to rely upon it as security for his debt, equity will not compel him to part with such title until his debt for the purchase price has been paid and where he institutes proceedings at law for the recovery of the purchase price he must offer to convey a marketable title to the land and be in a position to perform the contract on his part and offer so to do before he can compel the vendee to pay the purchase price.¹⁴

§ 189. Foreclosure of Land Contract — Bill of Complaint Form.

(Title and Introduction.)

1. That on or about the.....day of.....

N. E. 513; Delano v. Saylor (Ky.), 113 S. W. 888; Lowe v. Maynard (Ky.) 115 S. W. 214; Wright v. Yates, 140 Ky. 283, 130 S. W. 1111; Elliott v. Walker, 145 Ky. 71, 140 S. W. 51; Groves v. Stouder (Okla.) 161 Pac. 239; Cleveland v. Bergen Bldg. & Imp. Co. (N. J. Eq.), 55 Atl. 117; Elterman v. Hyman, 192 N. Y. 113, 127 Am. St. Rep. 862, 15 Ann. Cas. 819, and note, 84 N. E. 739; Ihrke v. Continental Life Ins. & Investment Co., 91 Wash. 342 L. R. A. 1916 F. 430, 157 Pac. 866; Townsend v. Vanderwerker, 160 U. S. 171, 40 L. Ed. 383, 16 Sup. Ct.

258; Everett v. Mansfield, 148 Fed. 374, 8 Ann. Cas. 956, 78 C. C. A. 188, 137 Fed. 190; Gerstell v. Shirk, 210 Fed. 223, 127 C. C. A. 41; Howard v. Linnhaven Orchard Co., 228 Fed. 523; Williams v. Shuman, 141 Ga. 114, 80 S. E. 625; Young v. Walker, 224 Mass. 491, 113 N. E. 363.

13. Old Second National Bank v. Savings Bank, 115 Mich. 548. See Sec. 155 ante for full collection of authorities on this subject.

14. Gates on Real Property, Sec. 617.

(here insert date contract was entered into), and at this date plaintiff was and is the owner of that certain parcel or tract of land lying and being situate in the county of.....and state of....., known and described as (here insert complete legal description of real estate).

2. That on the day and date aforesaid, plaintiff entered into a written contract with the said.....(here insert the name of defendant or defendants), for the sale and transfer of said described and to the said.....(here insert the name of defendant), which said agreement provided (here insert brief description of the terms of the agreement and especially the provisions which the defendant has violated), a true copy of such agreement being hereto attached and marked "Exhibit A" and made a part hereof.

3. That simultaneous with the execution of said contract the same was duly delivered to the parties thereto and said defendant thereupon paid to this plaintiff thereunder, as provided therein, the sum of.....dollars and possession of said premises was thereupon surrendered to the said defendant.

4. That in and by the terms of said contract there became due on the.....day of.....the sum of.....dollars, as one of the installments of the principal of said contract, together with interest thereon from the.....day of.....(here describe fully the payments which became due under the terms of the contract and upon which the vendee became in default, including taxes or any other arrearages under the contract), and that there is now due and wholly unpaid under and by virtue of the terms of said contract, the sum of.....dollars.

5. That it is provided by the terms of said contract that if the defendant made default in any of the payments which became due thereunder, all his rights under said contract would thereby cease and determine and be forfeited. That said defendant has defaulted in making the payments and in performing the conditions of said contract as hereinbefore set forth and that all his rights under said contract have ceased and determined.

6. That this plaintiff is ready and willing to carry out his part of said contract, but the defendant has failed, neglected and refused to pay the amount due thereon and has made default therein and that there is due, owing and payable to this plaintiff upon and by virtue of said contract, the sum of.....
.....dollars with interest from the.....day of
.....

7. That no proceedings at law have been had for the recovery of the debt secured by said contract or any part thereof and that said debt has never been collected or paid.

WHEREFORE, Plaintiff prays, as follows:

(a) That an account may be taken under the direction of the Court of the amount due this plaintiff upon said contract for principal or interest or both, or for any taxes so secured by said contract and that the defendant may be decreed to pay to this plaintiff the amount due and payable to him, on taking such account together with the costs of this suit at a day to be appointed by this Court for that purpose and that in default of such payment, the defendants herein and all persons claiming under or through them or any of them may be forever barred or foreclosed of and from all right and equity of redemption and all claim and interest of, in and to the lands and tenements described in said contract.

(b) That in default of said payment that the said land and tenements may be sold under the direction of this Court and the money arising from such sale or so much thereof as may be necessary, be applied to satisfy and pay the charges of such sale and the amount so found due and payable to this plaintiff, with the said costs, and that the defendants herein and all persons claiming or to claim under them or any of them who may come into the possession of said lands or tenements or any of them since the filing of the notice of the pendency of this suit as provided by law, or after having received actual notice of such pendency, be decreed to deliver and yield possession thereof to the purchaser or purchasers at said sale, upon his or their producing the deed or deeds therefore executed by the officer or person appointed by the Court to conduct such sale, together with a certified copy of the order of the Court confirming such sale, after the order has become absolute.

(c) That the said defendant.....may be decreed to pay to this plaintiff the balance of the debt due and payable to him remaining unsatisfied after such sale of said contract premises and that the plaintiff may have execution therefor and for his costs according to the rules and practices of this Court.

8. That plaintiff may have such other further and different relief as shall seem to the Court just and equitable in the premises.

§ 190. Decree of Foreclosure—Form.

(Here insert caption.)

At a session of the Circuit Court for the County of....., in Chancery, held at the Court room in the City of..... on the.....day of....., present the Honorable Circuit Judge.

This cause having come on to be heard upon the pleadings and proofs taken therein in open court, and having been argued by counsel for the respective parties and the Court having duly considered the same and being duly advised in the premises does find that the allegations contained in the bill of complaint are true and the plaintiff is entitled to the relief prayed for in his bill of complaint and that the defendant is not entitled to the relief prayed for in his answer.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

That the defendant pay to the plaintiff on or before thirty days from this date, the sum of.....dollars (here insert the aggregate amount due under the contract including principal and interest), together with interest on such sum at the rate of six per cent (6%) per annum from the.....day of....., the date of this decree, which said sum, as aforesaid, includes the various amounts of principal, interest and taxes due on said contract at the date of this decree.

2. That upon the payment to the plaintiff, of said sum of dollars, together with interest thereon, as hereinbefore provided, on or before the.....day of..... shall constitute a satisfaction of this decree and that upon the payment to plaintiff of said sum, as aforesaid, the plaintiff shall

file in this cause, a satisfaction of this decree and a discontinuance of this suit.

3. It is further ORDERED, ADJUDGED AND DECREED that if the defendant shall fail to pay to the plaintiff on or before 30 days from date the sum decreed to be due plaintiff under paragraph one, herein, that thereupon the whole amount of said contract with interest and taxes shall become due and payable to the plaintiff, which said sum so due for principal, interest and taxes at this date is decreed to be the sum of dollars and the sum remaining unpaid under said contract is decreed to be the sum of.....dollars and that upon failure to pay the plaintiff said sum mentioned in paragraph one on or before thirty days from this date, the plaintiff may after the.....day of.....cause all and singular, the premises mentioned in the bill of complaint and in said contract and hereinafter described, to be sold at public auction by or under the direction of the Circuit Court Commissioner for the County of.....for said full sum of money. Advertisement and notice of such sale shall not commence until after the.....day of..... That said commissioner give public notice of the time and place of such sale according to the course and practice of this Court in case of sale under decrees of foreclosure of mortgages and of the statute in such case made and provided and that the plaintiff or the defendant may be the purchaser or purchasers of said premises on such sale and that said commissioner execute a deed to the purchaser or purchasers of said premises on said sale; that said commissioner out of the proceeds of said sale, pay to the plaintiff or to his attorneys, his costs in this suit to be taxed also, the amount so decreed to be paid, as aforesaid and the interest thereon, as aforesaid or so much thereof as the amount realized from said sale will pay of the same and that the said commissioner take a receipt for the amount so paid and file the same with his report of said sale and of his doing thereon and that he bring the surplus money arising from said sale, if any thereby, into this Court without delay to abide the further order of this Court.

4. That the defendants herein (here name them if there is more than one), and all persons claiming or to claim under

them or any of them, or any person who has come into the possession of said premises since the filing of the lis pendens in this cause, shall be upon said sale, forever barred and foreclosed from any and all equity of redemption and claim thereto and to said premises so sold and from any part and parcel and that the purchaser upon said sale shall be entitled to immediate possession of said premises after the expiration of eight days from the filing of an order confirming said sale.

5. It is further ordered that if the money arising from said sale shall be insufficient to pay the amount hereby decreed to be due the plaintiff with the interest thereon and the costs and expenses of sale, as aforesaid, then in that case the said commissioner shall specify the amount of such deficiency in his report of said sale and that the plaintiff have leave upon the coming in of said report and its confirmation, to apply for execution for such deficiency against the defendant who is hereby decreed to be personally liable for the debts secured by said contract.

6. That the description and boundaries of the property authorized to be sold, by virtue of this decree, are as follows: (Here insert complete legal description of the property).

Circuit Judge.

§ 191. Commissioner's Deed on Foreclosure Sale.

THIS INDENTURE made the.....day of....., A. D. 19....., between.....a Circuit Court Commissioner in and for the county of.....State of Michigan, residing in said county, hereinafter referred to as party of the first part and.....hereinafter referred to as party of the second part, Witnesseth:

Whereas, at a session of the circuit court for the county of.....in Chancery at the county house in the.....in said county, on the.....day of.....A. D. 19....., it was among other things, Ordered, Adjudged and Decreed by said court in a certain cause then pending in said court between A. B. plaintiff and C. D. defendant, brought for the purpose of foreclosing a certain land contract bearing date of the.....day of..... (if land contract is recorded, here describe the liber and page number where recorded that all

and singular the premises mentioned and set forth in the bill of complaint in said cause, or so much thereof as should be necessary to satisfy the amount due the plaintiff of the principal, interest and costs of said suit be sold, by or under the direction of the circuit court commissioner in and for said county at public auction in the county where said premises or the greater part thereof were situated, the said commissioner first giving public notice of the time and place of said sale according to the course and practice of said court and

Whereas, the said party of the first part hereof in pursuance of the order and decree of said court did on the..... day of.....in the year A. D. 19....., sell at public auction at the.....in the county of.....State of Michigan, said premises hereinafter particularly described, having first given the previous notice of the time and place of said sale as by the order and decree aforesaid and the statutory provisions relating thereto, at which sale the said premises were sold and struck off to said party of the second part to these presents to-wit: (Here insert name of party of second part) for the sum of....., that being the highest sum bid for the same and he being the highest bidder.

Now, therefore, this indenture witnesseth that the party of the first part to these presents in order to give and to effect the said sale so made as aforesaid, in pursuance of said decree and order of said court and also by virtue of the statute in such cases made and provided and in consideration of the premises and the sum of.....paid by said party of the second part to these presents, to the said party of the first part hereto the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, alienated, released, conveyed and confirmed and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part and to.....heirs and assigns forever, all the following lands and premises situated in the.....of.....in.....county and State of Michigan known and described as follows to-wit: (herein insert description) together with all and singular, the rights, title, easements, privileges, hereditaments and appurtenances to the same belonging or in any ways appertaining to have and to hold the said premises

above described and hereby intended to be granted and conveyed unto the said party of the second part.....heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part, Circuit Court Commissioner as aforesaid, has hereto set his hand and seal the day and date first above written.

Signed, sealed and delivered in the presence of

Circuit Court Commissioner.

§ 192. Notice of Sale by Circuit Court Commissioner—Form.

In pursuance of a decree of the Circuit Court for the County of....., in Chancery, made and entered on the..... day of..... A. D., 19....., in the above entitled cause, the undersigned subscriber, a Circuit Court Commissioner of the County of....., shall sell at public auction or vendue to the highest bidder at the front door of the court house in the city of..... in said county of..... on the..... day of..... A. D. 19....., at the hour of..... o'clock in the..... noon of that day, all those certain lands and premises being in situate, etc. (here describe land, inserting complete legal description).

§ 193. Affidavit of Posting Notices of Sale—Form.

State of Michigan,
County of..... } ss.

..... of (here insert name of deponent) of..... (here state residence) in said County, being first duly sworn, deposes and says that on the..... day of....., A. D. 19....., he posted up one notice of sale, of which the following is a true and complete copy, at each of the following named places in the..... of....., in said county, to-wit:

One at..... (here describe place of posting). One at..... (here describe place of posting) and one at..... (here describe place of posting) the same being three public places in said county of....., and that each and all of said notices were conspicuously and securely posted, and were

in words and figures as follows, to-wit: (here paste copy of notice posted).

Subscribed and sworn to before me this.....day of
.....A. D. 19.....

Notary Public.....County, Mich.

§ 194. Circuit Court Commissioner's Report of Sale—Form.
(Caption of Cause.)

(Address to the Court.)

In pursuance and by virtue of a decree of this Court, made in the above entitled cause, bearing date the.....day of
.....in the year one thousand nine hundred and.....
by virtue of which decree, it was, among other things, ordered adjudged and decreed that all and singular the premises mentioned in bill of complaint in this cause and hereafter described, or so much thereof as might be sufficient to raise the amount due the plaintiff, for the principal, interest (taxes, insurance and other charges included in the decree) and costs in this case, provided a portion of said premises might be sold separately without material injury to parties interested, to be sold at public auction by or under the direction of a Circuit Court Commissioner of.....County, Michigan, at any time after the.....day of.....in the year 19..... That said sale be made in the County where said premises or the greater part thereof are situated.

That the Commissioner give public notice of the time and place of such sale, according to the statute and the course and practice of this Court and that the plaintiff or any parties to this cause might become the purchaser and that said Commissioner execute deed or deeds to the purchaser or purchasers of said premises on said sale. That said Commissioner, out of the proceeds of said sale, pay to the plaintiff or the attorney for the plaintiff.....costs in this suit to be taxed, and also the amount reported due, as aforesaid, together with interest thereon from the date of said report, or so much thereof as the purchase money of said premises will pay of the same, and that the said commissioner take receipts for the amount so paid and file the same with his report and that he bring the surplus

moneys arising from such sale, if any there be, into this Court without delay to abide the further order of this Court; and that if the moneys arising from said sale be insufficient to pay the amount so reported due to the plaintiff with interest, cost and expenses of sale as aforesaid, that said commissioner specify the amount of such deficiency in his report of said sale.

I, the subscriber.....said Circuit Court Commissioner, do respectfully certify and report, that having been charged by the attorney for the plaintiff with the execution of said decree, I advertised said premises to be sold by me at Public Auction to the highest bidder at the front door of the court house in the.....of.....in the said County of..... (that being the place of holding the circuit court for the County of.....) on the.....day of.....in the year one thousand nine hundred..... That previous to said sale I caused notice thereof to be publicly advertised for six successive weeks as follows: By causing printed notices thereof to be securely fastened up and posted at least six weeks prior to the day said premises were advertised to be sold in three public places in.....(here insert the name of city) where said premises were to be sold, an affidavit showing the fastening up and posting of notices is hereto attached, marked "Exhibit A," and made a part of this my report, by causing a notice of said sale to be printed once in each week during the six successive weeks preceding said sale in the, a public newspaper printed and circulating in the County of....., as appear by affidavits annexed hereto, and marked "Exhibit B," which notice contains a description of said premises.

I further report that on the said.....day of.....in the year one thousand nine hundred and....., the day of which said premises were so advertised to be sold, as aforesaid I attended at the time and place fixed for said sale, and exposed said premises for sale at public auction or vendue to the highest bidder and the said premises were then and there fairly sold and struck off to.....(here insert name of purchaser) for the sum of.....dollars, he being the highest bidder therefor, and that being the highest sum bid.

And I do further certify and report that I have executed, acknowledged and delivered to the said purchaser the usual commissioner's deed for said premises, the attorney for the plaintiff having produced a certificate of the enrollment of the final decree, in said cause, which certificate is hereto annexed, marked "Exhibit C," and made a part hereof and have paid over or disposed of the purchase money, or proceeds of said sale, as follows, to-wit: I have paid to the attorney for the plaintiff the sum of.....dollars, being the costs of this suit as taxed, together with interest thereon from the date of said taxation to the day of the sale and have taken a receipt therefor, which is hereto annexed.

I further report that I have paid to.....the plaintiff in said cause the sum of.....dollars, as provided in said decree and have taken his receipt for the full amount decreed to be due him, which receipt is hereto attached, marked "Exhibit D," and made a part hereof.

I further certify and report that the moneys arising from said sale are more than sufficient to pay the amount so reported to be due the plaintiff with interest, costs and expenses of sale as aforesaid and I hereby specify the amount of such surplus to be the sum of.....dollars (if the premises sell for less than the amount decreed to be due the plaintiff, together with the interest costs and charges, specify the amount of such deficiency instead of reporting a surplus).

I further report that I have retained in my hands the sum of.....dollars, being the amount of my fees and disbursements on said sale, as will appear by reference to the statement thereof, annexed to this my report marked "Exhibit E," and made a part hereof.

I do further certify and report that the premises so sold and conveyed as aforesaid were described in said decretal order and in the deed so executed by me as aforesaid as follows, to-wit: (insert description of each parcel sold and to whom sold).

Circuit Court Commissioner.

§ 195. Exhibit C—Statement of Fees and Disbursements by Circuit Court Commissioner on Sale.

Disbursements

Printer's bill (publication of notice of sale).....	
Printer's bill (publication of notice of adjournment of sale)	
Proof of publication of notice of sale.....	\$0.25
Proof of publication of notice of adjournment of sale.....	.25
Certificate of acknowledgment	.25

Total Disbursement

Fees

Drawing advertisement (notice of sale).....	\$2.00
Drawing advertisement (notice of adjournment of sale)....	2.00
Posting notices of sale.....	1.00
Mileage, ...miles, at 10 cents a mile.....	
Posting notices of adjournment of sale.....	1.00
Mileage, ...miles, at 10 cents a mile.....	
Attending at time and place of sale, and adjourning the same	2.00
Mileage both ways, ...miles, at 10 cents a mile....	
Attending and making sale.....	3.00
Mileage both ways, ...miles, at 10 cents a mile....	
Executing and making.....deed at.....	2.00
Certifying payment.....	2.00
Report of sale.....folios at 15 cents a folio.....	

Total disbursements

Total fees

Recapitulation

\$.....	Principal and interest and other moneys due at date of sale.
\$.....	Cost and interest due at date of sale.
\$.....	Commissioner's fees, costs and expenses of sale.
\$.....	Total amount due at date of sale.
\$.....	Amount realized on sale of promises.
\$.....	Amount of deficiency (or surplus) reported.
\$.....	Amount paid to complainant's solicitor on debt.

\$.....Amount paid to complainant's solicitor on costs.

\$.....Amount of commissioner's fees, costs and expenses of sale retained.

Dated....., A. D. 19.....

.....
Circuit Court Commissioner.

.....County, Michigan.

§ 196. Forms of Receipts from Circuit Court Commissioner.

(Caption of Cause.)

Received this.....day of....., A. D. 192....., of....., the commissioner who made the sale of the premises in said cause, ...dollars, said sum being part of the proceeds of said sale and being the amount of plaintiff's cost of suit as taxed, with interest thereon to date, and also the sum of.....dollars, the same being the full amount decreed to be due the plaintiff in said cause, together with interest thereon from the.....day of....., A. D. 192.....

§ 196A. Pleadings and Briefs Used in Late Michigan Cases—Foreclosure of Vendor's Lien.

BIGNELL v. FRANKS, 212 Mich. 236—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer and Cross-Bill.
- (d) Plaintiff's Answer to Defendant's Cross-Bill.
- (e) Decree.
- (f) Authorities Cited by Plaintiff—Brief for Plaintiff.
- (g) Authorities Cited by Defendant—Brief for Defendant.

NELSON v. BREITENWISCHER, 194 Mich. 30—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Exhibits "A" and "B", the Contracts Relied Upon.
- (d) Motion of Defendant to Dismiss.
- (e) Affidavit to Motion to Dismiss.
- (f) Order Dismissing Bill.

(The Brief of Plaintiff and Defendant has not been included for the reason that the appeal has to do with the question of the mortgage tax law only.)

BIGNELL v. FRANKS, 212 Mich. 236—

(a) Brief Statement of Fact.—A bill was filed to foreclose a land contract. The defendant showed that both parties had been operating under a later agreement, and not that under which the plaintiff's favor, and both parties appealed, the case being rewarded after affirming the decree in part, and ordering an accounting to determine the exact amount due plaintiff.

(b) Bill of Complaint.—

STATE OF MICHIGAN

In the Circuit Court for the County of Ottawa,
In Chancery

Jamies Bignell,
Plaintiff, }
v. }
James A. Franks, et al, }
Defendants. }

To the Circuit Court for the County of Ottawa, in Chancery:

Complaining, shows to the court your orator, Jamies Bignell, of said county, and exhibits this, his bill of complaint, against James A. Franks and Martin Van Doorn, Jr., defendants herein, and thereupon your orator states, complains and charges as follows:

I. That on, to-wit, the 10th day of April, 1907, your orator then being the owner of the land herein described, made a contract to sell the same to defendant, James A. Franks, for amounts and stated payments therein expressed, copy of which contract is as follows:

Duplicate land contract. Jamies Bignell hereby agrees to sell to James A. Franks, the following described land in Ottawa County, Michigan, viz.: Part of northwest quarter of southeast quarter of southwest quarter of section twenty-one, town eight north, range sixteen west, in Grand Haven city, commencing on north line of Washington avenue, 183 feet east from southwest corner thereof, thence north to south line of Columbus avenue when extended east; thence east on said south line of Columbus avenue, extended, 444 feet; thence south 132 feet; thence west, parallel with south line of Columbus avenue, extended, 300 feet; thence south 132 feet to north line of Washington avenue, and west on said line to place of beginning; also the canning factory building partly in Columbus avenue, extended, for twenty-eight hundred dollars, to be paid \$100 per year for three years, and, if he puts up an additional hothouse on the land costing not less than \$250, it shall include the first year's payment of \$100, and after three years the payments shall be not less than \$250 per year, with six per cent. interest to be paid semi-annually on \$2,500 from this date, and on the \$300 balance to be paid within three years, there is to be no interest, if paid when due, otherwise six per cent. interest from this date.

Said Bignell is to build sidewalk in front of said land on Washington avenue.

Said Franks shall keep all taxes on the land paid before return thereof, and shall keep all insurable buildings insured against loss by fire for Bignell's benefit, to apply on this contract purchase price until final payment.

Said Franks shall remove said canning house and all other buildings in Columbus avenue, extended, from said avenue by July 1st, 1907.

If said Franks shall fail to make payments, or any payment, or perform any other condition above, this contract shall be void, and all payments made stand forfeited and said Franks, his heirs and assigns, shall be tenants of said Bignell, his heirs and assigns, and may be ousted as such for nonpayment of rent.

If said payments shall be made and conditions performed, said Bignell, his heirs and assigns, shall convey the land to said Franks, his heirs and assigns, by good title and warranty deed.

In case of forfeiture, the tenant shall have the right to harvest all annual crops growing, but not to possession of the premises otherwise.

In witness whereof the parties hereto have set their hands and seals this 10th day of April, 1907, in duplicate.

Jamies Bignell (Seal)

Jas. A. Franks (Seal)

A duplicate of said contract signed by the parties is now in plaintiff's possession and will be shown to the court at the hearing hereof, and a like duplicate copy is believed to be in possession of defendant, Franks.

II. That said Franks took possession of said land described in said contract, and has continued since the making thereof, and is still in possession thereof, except as to a parcel thereof which he has contracted to sell to defendant, Martin Van Doorn, Jr., for \$1,000, of which said Van Doorn has taken possession and is now building a house thereon, which parcel is described as follows, or may be so described:

"Part of northwest quarter of southeast quarter of southwest quarter of section twenty-one, town eight north, range sixteen west, bounded, viz.: Commencing on north line of Washington avenue, City of Grand Haven, 183 feet east of southwest corner; thence north 132 feet, east 50 feet, south 132 feet to north line of Washington avenue, and west on said line to place of beginning."

But said Franks is and will be unable to give said Van Doorn title to said lot sold to him except it comes from this plaintiff, and this plaintiff is willing to and here offers to convey said lot to said Van Doorn under said contract, with Franks if the money from Van Doorn, or a fair and reasonable part thereof shall be paid to him, plaintiff, and he will take the balance due him, or to become due to him, from said Franks on a lien against the remainder of said contract land held by said Franks.

III. That said Franks paid and satisfied plaintiff under said contract to and including October 10, 1909, and June 6, 1910, the amount then due thereon except \$20.60 interest; that thereafter and until about April 25, 1911, there were claims made by said Franks concerning other deal

previous to said contract between plaintiff and said Franks, all of which were settled by said contract, and such claims were fully settled and satisfied and abandoned by said Franks, and on said April 25, 1911, \$325.00, part of the amount then due from said Franks, was paid on said contract by Mr. Farr, his attorney, and thereafter, October 10, 1911, \$67.50 was like paid by Mr. Farr for Franks, and April 10, 1912, \$317.50 was like paid by Franks' check endorsed by Mr. Farr, and thereafter until April 2, 1918, all payments of principal and interest on said contract were promptly made by said Franks when due, he having abandoned the claims he had made from June 6, 1910, to April 25, 1911, and he and his said attorney having then paid all arrearages on said contract.

IV. That there were \$250.00 due on principal and \$22.50 interest on same for six months due from Franks to plaintiff on said contract April 10, 1918, and April 15th a polite request of payment was made to him by plaintiff's attorney, to whom all payments have been made since the settlement of April 25, 1911, but the same has not been paid nor any part of it, and by the terms of the contract the same is void by reason of said nonpayment and all payments made forfeited, but plaintiff is not disposed to insist on such forfeiture, that the entire amount of said contract purchase price now unpaid at date of drafting this bill of complaint is the sum of \$750.00 and interest thereon at six per cent. per year from October 10, 1917, \$27.13, total amount due May 17, 1918, \$777.13, for which amount claims a lien and for foreclosure thereof.

V. That April 20, 1918, plaintiff received a letter from Mr. Lillie, defendant Franks' attorney, suggesting some claim of Franks against plaintiff which plaintiff does not understand, but believes it to be concerning some matter settled between plaintiff and him in making said contract and afterwards revived by said Franks in his refusal to further make payments thereon June 6, 1910, and April 25th which claim, whatever it was, was abandoned and given up by Franks under advise of Mr. Farr, his attorney, and by his steady and regular payment of amounts due from the last date to April 10, 1918, when the last refusal was made.

VI. That by said contract, plaintiff has the right to declare the same forfeited and he hold the land described therein and contracted to be sold free therefrom, or to have his lien thereon determined to be the amount unpaid thereon, all of which has become due by reason of said default and refusal to pay, and foreclosure thereof, and he, not believing it to be equitable to claim forfeiture, is willing to have his lien determined by the court and sale of the land therefor, and in such case he charges the fact to be that the remainder of the land, after deducting the lot described as sold by Franks to defendant Van Doorn, should be first sold and if it shall bring sufficient to pay plaintiff's lien, as plaintiff believes it will, that the lot sold defendant Van Doorn, be released therefrom, and this plaintiff will convey the entire land described in the contract to Franks and he can convey his lot to Van Doorn, or plaintiff will convey his lot to Van Doorn, and the balance to Franks, as the

court may determine, all which propositions are made by plaintiff in his offer to do absolute and complete equity in the premises.

VII. In consideration of the premises plaintiff prays the aid of the court as follows:

(a) That the court will hear the proofs and allegations of the parties and determine and decree the several and gross amounts paid by defendant Franks, on said contract, and the amount unpaid thereon, and the amount due thereon, and decree payment thereof within such reasonable time after entry of the decree as shall be reasonable, which plaintiff suggest should be twenty days.

(b) That the court decree that such amount determined to be due is a lawful lien on the land described in said contract, and that the same be sold to satisfy such lien by a commissioner of the court, the land still held by said Franks to be sold first, and if it shall not bring sufficient to pay the same, then that the part sold to defendant, Van Doorn, be sold to satisfy the deficiency.

(c) That plaintiff, or any other interested party may lawfully bid at such sale.

(d) That the commissioner making such sale give the usual legal notice thereof required by law in making chancery sales.

(e) That the commissioner making such sale made the usual commissioner's deed to the purchaser or purchasers at such sale, and that by such sale all rights of defendants herein to said land or such part or parts of same as shall be sold, be forever foreclosed and cut off, and that the purchaser or purchasers at such sale be let into possession by the writ of assistance of the court according to its course and practice.

(f) That if the court shall decree that there be but the payment due on said contract April 2, 1918, and interest, that it further decree the payments due in one and two years from that date to be lawful liens on said land, and that sale may be had therefor when they shall become due unless they shall be duly paid, with interest accruing thereon, as prayed above, to the end that plaintiff shall not be required to file further bills for foreclosure when each payment shall become due.

(g) That your orator may have such other and further relief in the premises as shall be agreeable to equity.

And your orator will ever pray, etc.

Jamies Bignell,
Plaintiff,
By Charles E. Soule,
His Attorney.
Plaintiff.

(c) Answer and Cross-Bill.—(Caption.) The joint and several answers of the above named defendants to the bill of complaint of the above named plaintiff except that the above named defendant, Martin Van Doorn, Jr., does not claim to know anything personally about the transactions between said plaintiff and said defendant Franks, but does know the arrangements between the defendant Franks, and defendant Van Doorn,

Jr., and the cross-bill of James A. Franks asking for affirmative relief.

1. For answer to the allegations in the first paragraph of plaintiff's bill of complaint, these defendants admit that the contract set forth therein is a true copy of the agreement made between defendant Franks and plaintiff Bignell, but deny that that contract was the real contract under which the plaintiff Bignell, and defendant Franks, were operating and did operate.

2. For answer to the allegations in the second paragraph of said bill of complaint, these defendants admit that the said Franks took possession of the land described in the contract in paragraph one and has continued in possession thereof until the spring when defendant Franks sold to defendant Van Doorn, Jr., the property described in said second paragraph of plaintiff's bill, and that Franks sold it for \$1,000.00, and admit that said Franks will not be able to give Van Doorn a good record title to said premises until the same is conveyed to him by plaintiff Bignell, but both defendants deny that the said Bignell is entitled to have any part of the contract price paid to him because defendant Franks says that plaintiff Bignell is indebted to him under the agreement that they have always done business under, and that plaintiff Bignell owes defendant Franks more than enough to pay all the claimed balance on the contract set forth in paragraph one of this bill of complaint, which will hereafter be stated in subdivision two of this answer and cross-bill.

3. For answer to the allegations in the third paragraph of said bill of complaint, these defendants say that they admit that said Franks paid in full on said contract mentioned in paragraph one of said bill of complaint and performed each and every obligation therein mentioned for him to perform up to and including June 6, 1910, admit that defendant Franks did make claims in reference to said contract, but deny that all of such claims were settled by said contract and deny that such claims were fully settled and satisfied and abandoned by said Franks; admit that the payments mentioned in paragraph three of said bill were made; admit that all payments of principal and interest were promptly paid by Franks, but deny that he abandoned the claims he had made from June 6, 1910, to April 25, 1911, and now claims that plaintiff Bignell owes him more than the amount claimed to be due on the contract set up in paragraph one in said bill of complaint.

4. For answer to the allegations in the fourth paragraph of said bill of complaint, this defendant says that according to the terms of said contract mentioned in paragraph one of said bill of complaint, there would be \$250.00 due on the principal and \$22.50 interest, April 10, 1913, but says under the terms of agreement actually made and performed between the plaintiff Bignell and the defendant Franks, plaintiff Bignell owes Franks more than the amount claimed to be due on the contract set up in paragraph one of the bill of complaint; neither admit nor deny the statement in said paragraph in reference to payments, and deny that all payments have been forfeited; neither admit nor deny that the entire amount of said contract purchase price is \$750.00

and interest at six per cent from October 10, 1917, making a total of \$777.13.

5. For answer to the allegations in the fifth paragraph of said bill of complaint, these defendants admit that a letter was written by Lillie, Lillie & Lillie suggesting that plaintiff Bignell and defendant Franks get together and settle matters between them, and suggest that they need no attorneys to do it, and they say that the plaintiff had the best reason in the world to believe that those suggestions were in reference to claims of said Franks, and they deny that any matter between said plaintiff and said Franks has ever been settled and deny that any claims of said Franks have ever been abandoned and deny that any claims of said Franks ever made were given up by Franks under the advice of Mr. Farr, his attorney, and deny that any claims made by Franks were ever abandoned by his steady and regular payments of amount due from the last date to April 10, 1918, when the last refusal was made, and claim that said Franks has always insisted that he has money coming to him from said Bignell, as will hereafter more fully appear.

6. For answer to the allegations in the sixth paragraph of the said bill of complaint, these defendants say that the said Bignell has no right to declare the contract forfeited and hold the land described therein free therefrom nor to have any lien thereon determined to be the amount unpaid thereon. And they deny that there has been any default on said contract and claim that said Bignell knows that under the dealings between him and Franks, that he, Bignell, owes said Franks at the present time, as will more fully and hereafter appear; that they admit that it would be inequitable to claim a forfeiture because the plaintiff knows that said contract has been fully paid and that plaintiff now owes said Franks, and defendant Franks is willing to have the plaintiff's claim determined by the court under all the circumstances between the parties, and admit that the remainder of the land, after deducting the lot sold by defendant Franks to Van Doorn should be first sold, if any, and is worth more than enough, many times over, to pay any pretended claim that plaintiff now makes; that they admit that in equity and justice the plaintiff should convey the whole property mentioned in said contract to defendant Franks, free and clear from any lien whatever, and say that when the plaintiff does actual justice and equity between himself and defendant Franks he will convey the entire property described in the contract to defendant Franks, besides that pay defendant Franks the money, he, plaintiff, has in his hands which now belongs to defendant Franks, and that all defendant Franks desires is that plaintiff shall be compelled "to do absolute and complete equity in the premises."

7. For answer to the allegations in the seventh paragraph of the said bill of complaint, this defendant denies that the plaintiff is entitled to the relief prayed for in paragraph seven of his bill of complaint and asks that said bill of complaint be dismissed with costs to defendants. Subdivision II is in the nature of a cross-bill.

II. This defendant, Franks, claims affirmative relief under the rules and practices of this court, and says:

1. That shortly after he received a letter from plaintiff Bignell, bearing date March 16, 1907, said Bignell called on him in pursuance of the terms of said letter and that they then talked the matter over in reference to the sale of said property deeded to said plaintiff by said Franks and his wife, and that talk was put in writing by the plaintiff Bignell, and also in substance that the property deeded to said Bignell was divided into lots and said Bignell and said Franks talked about the price that each lot should be sold for and that said Franks was to have what was commonly called the greenhouse property and 12 lots and Bignell was to have the lot the dwelling house was on, called dwelling house lots, and six other lots, and that would leave 18 lots and that those 18 lots were to be sold by Bignell and Franks was to have the net profits on such sales and the net profits so made were to apply on the contract that Bignell and Franks were to enter into in reference to said property; that Franks was to pay \$2800.00 for the greenhouse property and that 12 lots, and Bignell was to have the house lots and six other lots for \$2000.00; that afterwards the contract that is being foreclosed was made by Franks and Bignell under the terms of that contract, among other things, if Franks fixed up or improved the greenhouse to the value of \$250.00 the \$100.00 payment for the first year should be allowed him on the \$2800.00 that he was to pay for the greenhouse property, and 12 lots allotted to him; that the 12 lots allotted to Franks have not been sold by Bignell, and whether Bignell has sold the six lots allotted to him defendant Franks knows not and cares not; that De Spelder street was to be opened up and conveyed to the city and Columbus street was to be conveyed to the city, and Wallace street was also to be conveyed to the city so that there would be access from those streets to the land; that the letter bearing date March 16, 1907, is in the words and figures following:

"Grand Haven, Mich., March 16, 1907. Mr. Franks, City.

Dear Sir:—I will stop Monday morning.

If I buy the whole thing, what would be the most you could afford to take the hothouses and 12 lots for, or would you be willing to rent for one or two years and about what can you afford to pay? Would you be willing to allow me 10 per cent. net on all money invested? You take the greenhouses and ten and one-fourth lots at \$300.00. I will take the house and six lots at \$2000.00. You have all the net profit that is made to apply on contract.

Resp.,

Jamies Bignell."

2. That Bignell put up \$6,473.63 to complete the payment on the contract that Franks had with Mrs. Buswell or Mrs. Coburn in order to have Franks get the title to the property mentioned in the deed of Franks and wife to plaintiff Bignell; that after the deed was made and executed and the contract made and executed which is being foreclosed and some time about the last of December, 1900, the plaintiff

Bignell and defendant Franks talked the matter over in reference to their agreement made shortly after the 16th day of March, 1907, and Bignell then agreed to make a statement showing the condition of the lots and the amount of money he had in the property and that on or about April 10, 1910, he presented to defendant Franks the following statement: "Lots

		Cash
7-8-400	400	1.00
9-275	275	
11-225	225	2.75
12-250	100	
25-140	40	
26-200	200	
27-200	200	
28-225	225	
29-225	225	
30-200	200	
31-175	175	
34-175	175	
35-150	150	
Road-400	400	
Franks-2700	100	
Dinsia-200	100	4.00
Rent-245	245	3.00
House Lots-2000		
3 Lots 500		
8,885	3,435	1.00"

and

"Prin	6,473.63
Till 1910 Apr. Int.	510.00
Surveying deeds on	43.83
Sidewalk	193.00
Filling	75.00
Abstracts	48.75
Soule's service	35.00
Suit on St. & C. Coburn.....	32.50
Tax	309.82
Time	357.50
Com	1,000.00

9,079.03

Insurance, water, repairs on house..... 55.00

9,134.00

8,885.00

249.00"

3. That before that time defendant Franks had made the improvements on the greenhouse and was entitled to a reduction of \$100.00 mentioned in the contract being foreclosed and that would leave the amount he had to pay on the contract \$2,700.00, as stated in the itemized statement before mentioned; that the house lots were put down in said statement as of the value of \$2,000.00, and a road was put down at the value of \$400.00, which was the price Bignell got for that part of De Spelder street that was deeded to the City of Grand Haven; that all of the expenses, together with the principal sum advanced by Bignell, was put down on his statement, including the principal, the interest, survey, sidewalk, filling, abstract, Soule's services, money paid to Coburn, taxes, and even time of Bignell's amounting to \$375.50, and commission of \$1,000.00, and even a charge was made for insurance and water pipes on the house that Bignell took, and Bignell on that statement even gave credit for the rents he had received from his property and the lot that he had sold for \$200.00, although he reported only \$100.00 cash and he reported three lots at \$500.00 and that made up his six lots that he was to have and did have; that said Franks was offered \$100.00 by Bignell to call the deal square, but Franks would not accept it and claimed that Bignell owed him more than that and considerable more, and that Franks afterwards figured up the amount of the profits Bignell had made and estimated the same at \$1,000.00, and that no part of this has ever been allowed Franks by Bignell on said contract, as Bignell agreed to do.

4. That plaintiff says in paragraph three of the bill of complaint:

"That said Franks paid and satisfied plaintiff under said contract to and including October 10, 1909, and June 6, 1910, said amount then due thereon except \$20.60 interest; that thereafter and until about April 25, 1911, there were claims made by said Franks concerning other deals previous to said contract between plaintiff and said Franks, all of which were settled by said contract, and such claims were fully settled and satisfied and abandoned by said Franks, and on said April 25, 1911, \$325.00, part of the amount then due from said Franks, was paid on said contract by Mr. Farr, his attorney"; that defendant Franks says that that statement in said paragraph three of the bill of complaint is an acknowledgment of the contract that he now claims was made after said letter of March 16, 1917, was received by him from said Bignell and acknowledges that said defendant Franks was making a claim that said moneys should be credited on his contract which is being foreclosed by this bill of complaint, and that plaintiff knew when said bill of complaint was made and signed; that said Franks had always claimed that there was due him a large sum from the sale of said lots under said agreement with said Bignell, and in the last clause in paragraph six of said bill of complaint, plaintiff says:

"And this plaintiff will convey the entire land described in the contract to Franks and he can convey his lot to Van Doorn, or plaintiff will convey his lot to Van Doorn and the balance to Franks, as the

court may determine, all of which propositions are made by plaintiff in his offer to do absolute and complete equity in the premises"; and that that statement in said paragraph six of said bill of complaint offers to do absolute and complete equity in the premises, and defendant Franks says as he said in the answer, that he has never abandoned any claim and still insists that the profits Bignell made on the sale of the eighteen lots are due him and should be applied on the contract being foreclosed.

5. And defendant Franks further says that no settlement was ever made and that he never abandoned his claim for said profits, but made the payments on the contract according to the terms of the contract until the amount claimed to be due on the contract was less than the amount that he is entitled to have credited on that contract by said Bignell to keep said Bignell from foreclosing said contract and compelling him to lose the property by not being able to pay until the amount due on the contract being foreclosed was less than the amount Bignell agreed to credit on said contract, which has not been credited; that the property described in the deed from Franks and wife to Bignell is the same property described in the contract between Allen J. Buswell and Charles Ross, and that that property was divided up between Franks and Bignell as above set forth and that Franks was to get the property described in the contract being foreclosed and Bignell was to get the house-lot and six other lots; that Bignell was to convey to the City of Grand Haven, Wallace street or a piece of 33 feet on Washington street and 183 feet deep, and that the part that Bignell was to get was 150 feet on Washington street and running back 264 feet to Columbus street and the same width on Columbus street; that the balance of the frontage on Washington street was divided into lots to be conveyed by said Bignell when they were sold, and the property north of Columbus avenue was to be conveyed by said Bignell when they were sold, and that the proceeds of those sales of all the property other than the property described in the contract set forth in paragraph one of the bill of complaint, and the house and lots mentioned that Bignell took for the sum of \$2,000.00 and the proceeds that were paid to defendant Bignell, were to be credited on Franks' contract; that Bignell actually sold to the City of Grand Haven that part allotted for De Spelder street for \$400.00 in cash and that \$400.00 was mentioned in the statement made to Franks April 10, 1910, as set forth in paragraph two of this cross-bill; that Bignell has appropriated to his own use the thirty-three feet that was allotted for Wallace street; that Columbus street has not been conveyed to the city for a street and that said Bignell uses the same for garden purposes and rents the same to various parties that the 18 lots over and above the lots described in the contract in paragraph one of the plaintiff's bill of complaint and the house lots and six lots Bignell took, leaving eighteen lots, there was one sold to Ringleburg for \$275.00; one to Poel for \$350.00; one to Dornbos for \$275.00; one to Verberkmoes for \$275.00; one to Van der Zalm for \$275.00; one to Sluter, which Woody now owns, for \$250.00; one to

Bruneau for \$150.00, and another to Bruneau for \$150.00; one to Koopman for \$150.00; one to Koeksema for \$250.00, and one to Bignell for \$250.00; one to Mulder for \$190.00; one to Beekman for \$250.00; one to Welch for \$250.00; one to Zeldenrust for \$250.00; one to Solms for \$200.00; one to Kamhout for \$200.00; one to Fisher for \$150.00; which would amount to \$4,540.00, included De Spelder street, but not including the value of the streets appropriated by said Bignell, and that the profit on the sale of said lots was at least \$1,000.00; that when Bignell made his itemized statement set forth in paragraph two of this cross-bill, including sidewalk, filling, taxes, time and commission, Bignell recognized the contract defendant Franks now claims under and which was made shortly after March 16, 1907, but that the statement does not state the true amount that Bignell got for the lots sold; that Bignell only claims sales to the amount of \$3,435.00, when, as a matter of fact, he sold the eighteen lots for \$4,540.00; that the fact that the contract being foreclosed sets forth the price to Franks for the greenhouse and lots at \$2,800.00, and Bignell on his statement set forth Franks' property at \$2,700.00; that those facts recognized the contract that Franks and Bignell made just prior to the date of the contract being foreclosed and which contract they have always worked under.

6. That the amount of profits over and above the estimated price of said eighteen lots that Bignell actually received from the sale of said eighteen lots, amounting to \$1,000.00, and the itemized statement Bignell gave Franks, set forth in paragraph two of this cross-bill, Bignell charges Franks with \$375.50 for his time, besides \$1,000.00 for commission, and the interest on the \$6,473.63 up to the present time, amounting to \$510.00; and the defendant Franks has been paying the interest on the contract being foreclosed and Franks claims that Bignell now owes him \$222.87 over and above the whole amount due, set forth in plaintiff's bill of complaint to foreclose the contract mentioned in paragraph one of the bill of complaint.

7. In consideration whereof the defendant Franks prays the aid of the court in the premises and that the plaintiff may, if he can show why this defendant Franks should not have the relief prayed, without oath (all answer in oath being hereby waived), full, true and perfect answer make to all and singular the matters hereinbefore stated and charged; and

(a) That this defendant Franks may be decreed to have fully performed all the law requires of him in reference to the contract herein being foreclosed; and

(b) That the plaintiff, James Bignell, being decreed to pay the said defendant Franks the sum of \$227.87, the said amount being the difference between what Bignell claims is due on said contract and the amount Franks claims that he is entitled to have endorsed on said contract; and

(c) That the court decree that the defendant Franks has actually paid the \$222.87 over and above the contract price, either in cash or under the actual terms of the agreement between Bignell and Franks in reference to the division of all of the property; and

(d) That the defendant may have such other and such further relief in the premises as shall be agreeable to equity and good conscience.

James Franks,
By Lillie, Lillie & Lillie,
Attorneys for defendant Franks.
Business Address:
Grand Haven, Mich.

(d) Plaintiff's Answer to Defendant's Cross-Bill.—(Caption.) Answer of plaintiff to defendant Franks' cross-bill.

Plaintiff answers this cross-bill paragraph by paragraph, reserving his lawful exceptions and objections thereto hereinafter set forth, as follows:

I. Answering paragraph one, plaintiff says that Franks was being foreclosed out of the entire property; he had bought it for \$6,000.00 on contract, had paid nothing, interest to the amount of \$473.50 had accrued, and \$6,473.63 was due; Mr. Coburn had also signed his note for \$500.00 which he had not paid, in winter and early spring of 1907, and wanted Bignell to furnish the money to buy the property and pay Mrs. Coburn, and let him save something from it.

They had several talks about the terms of their deal. Bignell admits he wrote Franks a letter suggesting several propositions on which they might deal, but he denies he wrote or authorized or ever saw the letter claimed by Franks. He never made a proposition that Franks should have all the net profits of the deal. He admits after he wrote the letter he did to Franks and before Franks deeded to him, they had an agreement how they would deal, which was that Franks should deed the entire property to him, he would sell back the greenhouse and twelve lots to Franks for \$2,800.00 with \$100.00 deduction if improvements were made, and nothing was said or considered that Franks had any other interest in the property, and he made a pencil memorandum in writing of the substance of the agreement, to which Franks agreed. This memorandum and the contract being foreclosed are all the contracts made between them.

Franks afterwards deeded to him the entire land and he raised the money and tendered it to Mrs. Coburn which, after litigation, she accepted, and deeded the land to Franks, April 5, 1907.

This writing Bignell made was taken by him and Franks to Mr. Soule's office after the trouble with Mrs. Coburn was over, April 10, 1907, and from it Mr. Soule drafted the contract for sale of the greenhouse property to Franks, which is being foreclosed in this suit, and this contract contains all that was in that memorandum contract, and the addition that in case of foreclosure Franks should have the right to harvest the crops he had growing. This was put in at Franks' request after Mr. Soule had asked them both if the contract read over to them contained everything in regard to their deal with the property, to which they both assented.

The deed from Franks to Bignell containing a clause that it conveyed the Franks' interest under a contract, and all that they should afterwards acquire, was made March 19, the deed from Mrs. Coburn to Franks, April

5, and the contract based on the memorandum made by Bignell before the deed was made, was made April 10, all in 1907.

Bignell did not pay Mrs. Coburn until he had the deed from Franks, and Franks would not deed to Bignell until he had the contract to buy the greenhouse property.

This memorandum made by Bignell was left on Mr. Soule's desk as embodied entirely in the contract finally made by the parties closing their deal.

Possession of the entire property except the greenhouse part was turned over to Bignell at once after the deal was closed, he paid his taxes thereon, and has had it ever since except as he has sold it.

Bignell denies everything in paragraph one, except as embodied in the above.

II. Bignell answers paragraph two, viz.: He admits making and giving to Franks the statement therein set forth, but denies that said statement shows or was intended to show any statement of account between him and Franks in regard to their deal, and he says said statement came to be made under circumstances, viz.: Sometime in 1909, he thinks, condemnation proceedings were taken by the city to take a strip 33 feet wide off the east side of the entire property for half of De Spelder street. He, owning the property, was made a party; he was anxious to make the best showing he could of the cost and value of the entire property to get as large award of damages as possible, and for that purpose made a statement used in the Probate Court having the proceedings in charge. He secured an award of \$400.00. Sometime after, he thinks it was when Franks paid on the contract to April 10, 1910, Franks asked him how much he had made on the deal, all the lots being then sold. He and Franks had been friendly to that time and no claim had been made that everything was not settled between them, and he told Franks he would make him a statement and he copied the statement he had used in the Probate Court and gave it to Franks. That is the statement set forth in paragraph two.

He says that after he bought the land from Franks he went to work at once to put it into shape to sell and did sell the lots. He spent the better part of two summers filling in front for the sidewalk, opening Columbus avenue through the center and filling it, to sell lots fronting on it, getting the sidewalk built along the entire Washington avenue front and paying for it, and putting in his time getting the land surveyed and selling the lots, and put the value of his work at but \$357.50. He paid Mrs. Coburn for her deed to Franks, all Franks had bought the property for the accrued interest Franks had not paid, \$6,473.63, interest on his money was \$510.00; he made other payments necessary to get the lots in shape to sell and in making the deal and in care of the property and selling the lots, \$1,302.90, making his investment and risk (it was not agreed or understood Franks would reimburse him for loss, if any), \$7,776.53. He charged the property commission or profit, \$1,000.00, in addition to his work, and with his work, \$359.50, makes his

charge to the property, not to Franks, \$1,359.50, and the balance struck in the statement shows a shortage of \$249.00, which deducted from his gross charge for work and profits of \$1,359.50, leaves him as payment for his risk and labor but \$1,108.50. He says this amount as payment for his risk and labor and care is not a gross profit and not unconscionable under all the circumstances.

Franks had not a dollar invested, he bought the entire property from Mrs. Coburn for \$6,000.00, had not paid the interest which had accrued for \$473.64. He secured the right in the deal to buy the twelve lots and the valuable greenhouses for \$2,700.00. He had made good and paid the \$2,700.00 down to \$750.00 and his interest to April 10, 1918.

He has sold one of the twelve lots with the greenhouse property for \$1,000.00 to defendant Van Doorn and has eleven lots left of like situation and value. He was bankrupt and would have been closed out, April 1, 1907, by Mrs. Coburn's notice to quit if Bignell had not paid her and saved him. With but a promoter's equity and no investment under Mrs. Coburn's contract, but with Bignell's investment, he has acquired the valuable greenhouse property and twelve lots at a cost of but \$2,700.00 and interest (and he has had the use of the property eleven years), and the greenhouse property is now worth \$10,000.00 or more. Bignell has made but \$1,108.50 for his risk and work. Franks has made \$7,000.00 or more without risk, and with but the investment of his payments to Bignell on the contract.

Bignell's equities in the deal to have his little profit are superior to Franks' to take his profit from him.

Bignell denies paragraph two except as embodied in the above.

III. Answering paragraph three, Bignell admits he has credited Franks' \$100.00 on the contract being foreclosed for building new greenhouse; admits his statement as to the several items in the statement, again says the statement was not his account with Franks but with his property bought from Franks; denies he offered Franks \$100.00 "to call the deal square" or had any talk with him about it; says Franks never made any claim for anything from him except at one time soon after he gave Franks the statement, Franks said to him he ought to divide with him, that Franks afterwards employed Mr. Farr as his attorney, who examined into his case and told Franks in Mr. Burns' presence he had no case, and told Mr. Soule the same, and Franks then, April 25, 1911, paid through Mr. Farr the amount due on the contract, and continued all his payments thereon until April 10, 1918, and never in any manner made any claim that Bignell owed him until since this suit was commenced. He admits that no claim of Franks, if any, that Bignell owed him has ever been allowed on the contract, and says all the payments made on the contract were by checks from Franks to Bignell sent by Mr. Soule for Bignell, except the payment by Mr. Farr, April 25, 1911.

Bignell again says that if he owed Franks anything as he now claims, he owed it to him when Mr. Farr paid on the contract, and the same has now become barred by the statute of limitations.

IV. Answering paragraph four, Bignell denies the statement quoted from his bill of complaint to foreclose the contract is an admission of his indebtedness to Franks; he repeats the same here as a statement that Franks made like claims as now when Mr. Farr was his attorney, which he abandoned when Farr made the payment for him on the contract, and if such claims, if ever of any validity, have become barred by the statute.

He denies Franks has ever made any claims of money due him from Bignell as to stating amounts and why due him, and he has never known what Franks claimed when Mr. Farr was his attorney, except as stated in this cause.

He admits the quoted statement from his bill as to his willingness to convey the lot sold to Van Doorn to him and the balance to Franks on payment of the amount due him on the contract. He is willing to do so now.

He admits his statement to do equity as stated in his bill as therein stated, viz., that he would insist on forfeiture of his contract with Franks but would claim only that the court adjudicate his lien on the land for the amount unpaid thereon, which he here again repeats, but he denies that such statement made any admission of the outlawed and untrue claim of Franks that there was any other contract between them by which he owed Franks any money, which he here again denies.

He denies that Franks did not more than six years ago abandon and give up all claim against Bignell under Mr. Farr's advice and go on with the payments on the contract, which claims are untrue, and if true, are barred by the statute of limitations and cannot now be asserted.

He denies all of paragraph four not embodied in this answer thereto.

V. Answering paragraph five, he denies that no settlement ever was made between him and Franks, and says that the contract between them being foreclosed in this suit was a complete and final settlement of all their deal concerning the property deeded to him by Franks and was so stated and declared by each of them when made, that it was made in writing signed by both of them and contained all the deal remaining between them; that the memorandum made previously was embodied in it entirely, and Frank's effort in this cause to prove by parol some other and different matter not contained in that contract is attempting to contradict and vary the written agreement contrary to law.

He again asserts that Franks gave up and abandoned his pretended claim of a different deal with Bignell under Mr. Farr's advice, more than six years ago and cannot now assert it, if true, which it is not. He denies Franks did not give up and abandon his pretended claim more than six years ago.

He admits the description to the land conveyed him by Franks is set up in his answer before, and asserts that the greenhouse property

is part of the same, being the equivalent of three 50 by 132 foot lots fronting on Washington avenue and ten like lots fronting on Columbus avenue extended across the entire ten acres.

He admits he paid Mrs. Coburn \$6,473.63 for a deed of the entire property to Franks after Franks had given his warranty deed to him, and says he afterwards paid out \$1,302.90, including interest on his money, for taxes, survey, building sidewalks and the like in expenses to get the property in shape to sell the lots, as before stated, and as set forth in his statement of his account with the property, not with Franks, heretofore referred to.

He denies it is any concern of Franks what he received for the part, Wallace street, or of the land condemned for De Spelder street, or any other part of the property sold by him, for it was his property and he could sell it or otherwise dispose of it as he saw fit, and did not have to account to Franks for what he got for it.

He again avers that he invested in this property deal, including interest on his money, \$7,776.50 at his own risk, Franks assumed none, his profit including his work for two years in getting his lots in shape to sell and selling them was but \$1,108.50, as shown in his statement of his deal with the property given to Franks as shown to the court, which he says is a very small profit to make for his risk, investment and labor and care.

He says Franks had made no investment, he bought the property from Mrs. Coburn, or her crowd, she holding it then for \$6,000.00; he had paid nothing, not even interest, and owed her \$6,473.63, which Bignell paid to save the entire loss to Franks under forfeiture proceedings then pending and nearly at end. Franks saved the greenhouse property and twelve lots on payment to Bignell of \$2,700.00 with long and liberal time and has been able to make his payments and make good by Bignell's liberality. He now has a property worth \$10,000.00 and has made clear over \$7,000.00. His profit is much more than Bignell's.

He admits he set off Columbus avenue across the property to sell the lots along it, and says Franks has much the advantage of it as he has his nine lots front upon it, but denies he received anything for it, except to sell his lots.

He denies as before that in making the statement he in any manner recognized Frank's claims under his parol contract. He made the statement for the purposes and under circumstances before stated, and again says it was a statement of his account with the property and not with Franks whose name is only mentioned in the enumeration of property sold. This stands at \$2800.00 with \$100.00 received, which was deducted and not paid, and reduces Bignell's gross profits from \$1,185.50 to \$1,008.50 only.

He again denies that in making this statement of his deal with his property he in any manner recognized the alleged contract claimed by Franks, and he says if Franks' alleged contract has any connection with the contract being foreclosed made subsequently, it became merged

in and a part of the later contract, and no proof of it can be made as contradicting the written instrument.

He denies every averment of paragraph five not denied or explained above.

VI. Answering paragraph six, he denies Franks is entitled to any credit for the profits he has made on the sale of the eighteen lots mentioned, or from De Spelder street or for the sale of any other of his property, or for any other matter except all the payments on the contract for which he has due credit, reducing the amount due thereon from \$2,700.00 when made to \$250.00 and interest, or \$750.00 and interest, April 10, 1918, there being \$273.06 due September 6, by the terms of the contract, or \$791.81, if the court shall determine the entire amount due by the forfeiture terms thereof.

He denies the court should make any decree giving Franks credit for the \$1,000.00 claimed or for any other sum under the alleged parol contract merged. He denies each and every other allegation of paragraph six, not specifically answered in the foregoing.

Further answering Franks' cross-bill, plaintiff Bignell says by way of objection to the same in the nature of demurrer:

(a) That the pencil memorandum made by him and claimed by Franks to have been the contract on which he relies for his defense in this suit, and which was used by Mr. Soule in drawing the contract being foreclosed herein, and which was the only other contract, if it was a contract, made between him and Franks, was not signed by either him or Franks, is not alleged in the cross-bill to have been signed by him as the party sought to be charged therewith, and is void as in any manner affecting the title to land.

(b) That said pencil memorandum was not made or intended to be a contract but a memoranudm only to be used, as it was used, by a competent draftsman to make the actual contract between them, which is the contract being foreclosed in this suit, and which contains all that was contained in said pencil memorandum with the additional clause suggested by Franks of his right to remove crops growing, in case of forfeiture; that said pencil memorandum did not contain any clause or provision for selling the eighteen lots by Bignell and in any way accounting to Franks for the proceeds, and no parol proof can be made or heard of Franks' claim of the same being contained in the alleged contract, the pencil memorandum written by Bignell, as contradicting the terms of the written contract; and that if such a contract was made it became merged in the written contract afterwards made by he parties, and no proof, parol, or otherwise, can be made of its contents as affecting the later contract being foreclosed in this suit.

(c) That if any such contract, as claimed by Franks, was made that Bignell was to sell the eighteen lots and account to Franks for the proceeds, which is denied, the same is a trust in lands and no parol proof of it can be made.

(d) That if any such contract was made, as claimed by Franks, which is denied, and Bignell was indebted to Franks for any of the proceeds of the sale of the eighteen lots, he became so indebted in 1909 or 1908, when he gave Franks the statement of what he had made on the deal; Franks then had a right of action for his share of the proceeds going to him; more than six years have elapsed and the debt is barred by the statute of limitations, and the same cannot be used as a set-off to any part, or the amount due him from Franks admitted in his answer to Bignell's foreclosure bill.

This averment is made especially to plead the statute of limitations to Franks' alleged set-off against the amount admitted to be due Bignell on the admitted contract being foreclosed in this suit.

In consideration of the premises, plaintiff Bignell prays that defendant Franks' cross-bill be dismissed and he have decree for the amount due him on foreclosure of the contract in this suit admitted by defendant Franks.

James Bignell,
Plaintiff,
By Chas. E. Soule,
His Attorney.

(e) Decree.—At a session of said court held at the court house in the City of Grand Haven on the 15th day of April, 1919.

Present: Hon. Orien S. Cross, Circuit Judge.

This cause came on to be heard on pleadings and proofs taken in open court. The court heard the proofs and after mature deliberation thereof, filed written findings March 26, 1919, of which the following is a copy:

"The bill of complaint was filed in this cause to foreclose a land contract. Issue was joined and proofs taken in open court.

From the testimony it appears that defendant Franks had contracted to purchase 26 lots in the City of Grand Haven, that being unable to furnish the purchase price for the same, all the lots were conveyed to the plaintiff and in consideration of the plaintiff furnishing the purchase price, it was agreed that the defendant Franks should have twelve lots upon which was situate a greenhouse, for the sum of \$2,800.00, less a deduction of \$100.00 upon the making of certain improvements, and the plaintiff should have six lots upon which was situated a residence, for \$2,000.00, and the balance of the lots were to be sold and after paying the plaintiff the balance of the purchase price, the expenses and 10 per cent. on the money invested, the profits were to be applied in payment of the purchase price of the twelve lots taken by defendant Franks.

Defendant Franks made payments from time to time until he considered he had fully paid the purchase price, when this suit was instituted by the plaintiff. The plaintiff claims that he never agreed to apply the profits of the sale of the eighteen lots in payment of the purchase price of the twelve lots purchased by the defendant.

The proofs show that the agreement was as claimed by the defendant Franks, and that after allowing the plaintiff the balance of the purchase price due him, his expenses and commissions, that the defendant had paid all of the purchase price of the twelve lots to the plaintiff except the sum of \$110.00, which sum the defendant Franks will be required to pay to the plaintiff within thirty days from the signing of the decree herein, and in default thereof the decree may provide for the foreclosure of the contract on the property now held by the defendant Franks.

The plaintiff will recover costs.

A decree may be prepared for signature in accordance with these findings."

Therefore, on motion of Charles E. Soule, plaintiff's attorney, it is ordered, adjudged and decreed that defendant James A. Franks, within thirty days from the signing and entry of this decree pay to plaintiff Jamies Bignell or to his attorney herein, said sum of one hundred ten dollars (\$110.00), together with said plaintiff's costs of this suit to be taxed, and interest thereon at six per cent. per year until paid; and that in default of such payment the land described in the land contract being foreclosed in this suit, and hereinafter described, be sold by a commission of this court after giving the notice required by law for like sales on foreclosure of mortgages to satisfy said amount due plaintiff and said costs; that at such sale any party to this suit may become the purchaser; that the commissioner making such sale make deed to the purchaser or purchasers thereat and report to the court of his proceedings thereof as in other like sales; that such sale be subject to due confirmation as other like sales; that the purchaser or purchasers at such sale after confirmation thereof, be let into possession by the writ of assistance of the court; and that by such sale and confirmation these of all the title and right of defendant, James A. Franks, and all persons holding and to hold under him, at the time of making the contract being foreclosed herein, and of all defendants in this suit, pass to the purchaser or purchasers at such sales and all defendants herein be forever foreclosed of all interest therein.

The land to be sold at such foreclosure sale is situated in the City of Grand Haven in said Ottawa county, and is described in said land contract being foreclosed and in the pleadings herein substantially as follows:

"Part of the northwest quarter of southeast quarter of southwest quarter of section twenty-one, town eight north, range sixteen west, in Grand Haven city, commencing on north line of Washington avenue, 183 feet east from southwest corner thereof; thence north to south line of Columbus avenue when extended east; thence east on said south line of Columbus avenue, extended 444 feet, thence south 132 feet; thence west parallel with south line of Columbus avenue, extended, 300 feet; thence south 132 feet to north line of Washington avenue, and west on said line to place of beginning."

It is further ordered, adjudged and decreed that plaintiff do have and recover from defendant, James A. Franks, his costs of this suit to be taxed, and that he have execution therefor, or that the same be recovered by sale of the land on foreclosure as above set forth.

Orien S. Cross,
Circuit Judge.

Charles E. Soule,

Plaintiff's Attorney.

Countersigned and entered by me.

Orrie J. Sluiter,
Clerk.

(f) Authorities Cited by Plaintiff. Brief for Plaintiff.—It is the contention of the plaintiff that the contract set up in plaintiff's bill of complaint is the only agreement entered into with defendant, and that as defendant has not paid the entire balance due, a decree should be entered allowing the plaintiff the amount conceded to be due. It is the contention of defendant that plaintiff was to sell the lots and account to the defendant for the proceeds.

1. Parol testimony is not admissible to vary the terms of a written contract. Greenleaf, par. 275.

In *Dudgeon v. Haggart*, 17 Mich., 279, the court said, citing *Adair v. Adair*, 5 Mich. 204:

"These instruments were made by the parties at the same time, and related wholly to the same subject-matter, and it was the duty of the court, and not the jury, to interpret them and, in so doing, to read and construe together as parts of a single transaction and not as instruments alien in their origin, object or subject-matter."

"Courts cannot substitute another contract for the one they made and force contract relations upon a party who had expressly refused to enter into them." *Burwitz v. Jeffers*, 103 Mich. 515.

2. Statute of Frauds.

The defendant's contention is that plaintiff wrote the following letter, and that it set up an agreement by which defendant is entitled to certain accounts:

"Mr. Franks: Our arrangement is this: You are to take the greenhouse and twelve lots, for \$2,800.00, with rebate of \$100.00 if you build a new greenhouse; I will take the house and six lots for \$2,000.00; it leaves eighteen lots to be sold, for which I take ten per cent. of my investment, or will endorse either the whole profits or net profits on your contract.

Jamies Bignell."

Such a writing is void under the statute of frauds. It describes no land, it sets forth no terms of payment, determines nothing unless aided by parol testimony, and the writing required by the statute of frauds is void unless complete in itself, requiring no parol proof. *Ebert v. Culler*, 165 Mich. 75; *Webster v. Brown*, 67 Mich. 328; *Gault v. Star-mont*, 51 Mich. 638.

"This statute has frequently been before this court for construction, and it has been held that a contract which is void under the statute of frauds cannot be used for any purpose." *Raub v. Smith*, 61 Mich. 547, and cases cited.

Were it claimed that defendant's interest in the land was a trust, it would still come under the statute and cannot be proved by parol. *Sherwood v. Davis*, 168 Mich. 405; *Douglas v. Douglas*, 72 Mich. 99; *Pierson v. Conley*, 95 Mich. 624.

In *Kulenkamp v. Goff*, 71 Mich. 679, the court said:

"If this defense can be allowed, then, as beforesaid, in speaking of the claim of fraud, every promissory note, as between the parties thereto, and every contract in writing, is open to parol proof that it does not correctly represent the agreement made, and oral evidence may be given to contradict, alter or vary such written agreement."

3. Statute of Limitations.

Defendant testified that all the lots were sold by April 10, 1910. He has never spoken to plaintiff since that date and made no claim for the money, and no credit was given to him on the contract for the sale of these lots. The bill was filed to foreclose this contract May 21, 1918, more than eight years after defendant says plaintiff owed him \$1,000.00.

No claim is made that this alleged "other" contract was under seal, and anything possibly due on it is barred six years after due.

In *Goodsole v. Jefferey*, 202 Mich. 201, it was held:

"Where the dealings of parties relate entirely to and are covered by a special contract for the payment of money at certain periods agreed upon, there is no open and mutual account, so as to prevent the remedy thereon being barred by the statute of limitations."

(g) *Authorities Cited by Defendants*—Brief for Defendants.—The defendants review the testimony in the record and claim that as the trial court found the position taken by defendant Franks to be true and the circuit judge having seen the witnesses and heard them testify, this court is bound to bring to the support of the decision of the trial judge all reasonable presumptions which arrive from his superior opportunity to determine the credibility of witnesses. *Hintz v. R. R. Co.*, 132 Mich. 305.

NELSON v. BREITENWISCHER, 194 Mich. 30—

(a) Brief Statement of Fact.

(b) Bill of Complaint.

(c) Exhibits "A" and "B," the Contracts Relied Upon.

(d) Motion of Defendant to Dismiss.

(e) Affidavit to Motion to Dismiss.

(f) Order Dismissing Bill.

(The Brief of Plaintiff and Defendant Has Not Been Included for the reason That the Appeal Has to Do with the Question of the Mortgage Tax Law Only.)

NELSON v. BREITENWISCHER, 194 Mich. 30—

(a) Brief Statement of Facts.—Bill of complaint was filed to foreclose a land contract for failure to abide by the terms of the contract. The defendant made a motion to dismiss on the ground that plaintiff failed to comply with the statute requiring a tax to be paid on all land contracts. From an order denying the motion to dismiss, plaintiff appeals, which was reversed on appeal.

(b) Bill of Complaint.—

STATE OF MICHIGAN

In the Circuit Court for the County of Montcalm,
In Chancery.

Clinton Nelson,

Plaintiff,

v.

Louis F. Breitenwischer and
Fannie H. Breitenwischer,
Defendants.

No.

Your orator, Clinton Nelson, of the City of Loma, County of Gratiot, and State of Michigan, respectfully shows unto this Honorable Court:

1st. That he is the owner in fee simple of the following described lands, to-wit, the east one-half ($\frac{1}{2}$) of the east one-half ($\frac{1}{2}$) of section twenty-two (22), and the west one-half ($\frac{1}{2}$) of section twenty-three (23), all in the Township of Home, being town twelve (12) north, of range six (6) west, of the value of twenty thousand dollars (\$20,000) and upwards.

2nd. That your orator obtained title to said lands by virtue of a certain deed of conveyance made on the 12th day of November, A. D. 1915, by James C. Walsh and Inez V. Walsh, husband and wife, of Grand Ledge, Michigan, which deed was duly recorded in the office of the Register of Deeds for the County of Montcalm, on the 10th day of December, A. D. 1915, in liber 163 of deeds on page 49, said deed being made subject to a certain real estate mortgage covering said lands held and owned by the Northwestern Mutual Life Insurance Company in the sum of nine thousand five hundred dollars (\$9,500), and also subject to a certain land contract executed on the 15th day of June, A. D. 1915, by James C. Walsh and Inez V. Walsh, husband and wife, to Louis F. Breitenwischer and Fannie H. Breitenwischer, of Lansing, Michigan.

3rd. That the said James C. Walsh and Inez V. Walsh, husband and wife, at the time of the execution and delivery of said deed were the owners in fee simple thereof, they having procured title through the legal grantors and grantees in succession.

4th. That on the 15th day of June, A. D. 1915, while the said James C. Walsh and Inez V. Walsh, were the owners of said lands in fee simple they entered into a certain land contract with Louis F. Breitenwischer and Fannie H. Breitenwischer, defendants herein, of the City of Lansing, County of Ingham and State of Michigan, in which they, the said James

C. Walsh and Inez V. Walsh, agreed to sell to, and the said Louis F. Breitenwischer and Fannie H. Breitenwischer agreed to buy said lands for the sum of thirty-five thousand dollars (\$35,000) and pay for the same as follows: The sum of eighteen thousand three hundred dollars (\$18,300) on the signing and delivery of said contract and the balance as follows: Two thousand dollars (\$2,000) thirty days from date of said contract, two thousand dollars (\$2,000) sixty days from date of said contract, with interest at six per cent. per annum subject to a mortgage of nine thousand five hundred dollars (\$9,500) then held and owned by the North-Western Mutual Life Insurance Company, covering said lands. A copy of said contract being hereunto subjoined and marked Exhibit A.

5th. That on the 12th day of November, A. D. 1915, the said James C. Walsh and Inez V. Walsh, husband and wife, assigned and transferred to your orator said contract. A copy of said assignment being hereunto subjoined and marked Exhibit B.

6th. That in and by the terms of said contract it was expressly stipulated and agreed on the part of Louis F. Breitenwischer and Fannie H. Breitenwischer.

(a) To purchase said lands and to pay therefor the said several sums hereinabove mentioned.

(b) To keep the buildings now on, or that may be placed on said premises, insured in the name of and in the manner and amount and by insurers approved by the said James C. Walsh and Inez V. Walsh.

(c) To enter said premises for taxation in their own name and to pay all taxes and assessments, ordinary and extraordinary, that may for any purpose be levied or assessed on said premises, and,

(d) Not to commit or suffer any other person to commit any waste or damage to said premises or the appurtenances, and that in the event they fail to keep said buildings insured and to pay the taxes against said premises, the said James C. Walsh and Inez V. Walsh were authorized and permitted to cause said insurance to be made and taxes to be paid and the amount thus expended to be and remain a lien on said premises and be added to the amount then unpaid thereon and bear interest at six per cent. per annum.

(e) That all buildings and improvements to remain on said premises as security for the performance of said contract.

(f) To take possession of said premises and remain thereon as long as they shall perform the covenants and agreements in said contract mentioned on their part to be performed, and no longer.

(g) That in case they violate or neglect to fulfill any of said covenants or agreement they shall forfeit all right or claim under said contract and be liable to be removed from said premises in the same manner as is provided by law for the removal of a tenant that holds over premises contrary to the terms of his lease, and notice to quit and forfeiture were expressly waived.

(h) It was also agreed on the part of the said James C. Walsh and Inez V. Walsh that in the event the said Louis F. Breitenwischer and

Fannie H. Breitenwischer shall upon the faithful performance of all of the covenants and agreements covenanted to be done and performed by the said Louis F. Breitenwischer and Fannie H. Breitenwischer, then they should execute and deliver a good and sufficient warranty deed of said premises thereby conveying the title thereof free and clear of all encumbrances, except taxes after the date of said contract and any claims and liens thereon subsequent thereto.

(i) It was further expressly agreed by and under the terms of said contract, that in case of the removal of said Louis F. Breitenwischer and Fannie H. Breitenwischer by reason of any forfeiture or failure on their part to carry out the terms, covenants and agreements set forth in said contract, then said James C. Walsh and Inez V. Walsh were duly authorized to take possession of the lands hereinbefore described, and in said contract described, and retain any and all improvements that may have been made as well as any payments that may have been made as stipulated damages for nonperformance of contract, and that the above named Louis F. Breitenwischer and Fannie H. Breitenwischer shall lose and be debarred from all rights, remedies and actions, both at law and in equity, upon or under said contract.

7th. Your orator further shows unto the court, that under and by virtue of the stipulations set forth and described in said contract, there is now justly due and payable to your orator, as the grantee of James C. Walsh and Inez V. Walsh and assignee of said contract, the just and full sum of seven thousand two hundred dollars (\$7,200) of principal with interest thereon at six per cent. from the 15th day of June, A. D. 1915.

8th. That your orator under and by virtue of the terms, covenants and conditions in said contract set forth and described hereby elects to declare said contract forfeited and your orator entitled to the possession thereof.

9th. In consideration of the premises and the statute in such case made and provided your orator prays,

1st. That the said defendants, and each of them, be required to true and perfect answer make to this your orator's bill of complaint, but not on oath, their answer on oath being hereby expressly waived, and,

2nd. That your orator be granted a decree of foreclosure of said contract by reason of the nonperformance on the part of the defendants herein, and,

3rd. That your Orator be placed in possession of said premises pursuant to the statute in such case made and provided, and,

4th. That your orator have such other, further or different relief in the premises as shall be agreeable to equity and good conscience. And your orator will ever pray, etc.

Clinton Nelson.

L. C. Palmer,

Solicitor for Complainant,

Business Address:

Stanton, Michigan.

State of Michigan, }
County of Gratiot. } ss.

On this 14th day of December, A. D. 1915, personally came before me a notary public in and for said county, Clinton Nelson, who, being by me duly sworn, deposes and says, he has read the foregoing bill of complaint by him subscribed and knows the contents thereof, and that the same is true, except as to such matters as are therein stated to be on information and belief, and as to such matters he believes it to be true.

Philip W. Creaser,

Notary Public

My commission expires March 16, 1916.

(c) Exhibits "A" and "B," the Contracts Relied Upon.—(Exhibit A)—This Contract, made the fifteenth day of June, A. D. 1915, between James C. Walsh and Inez V. Walsh, of Grand Ledge, Eaton County, Michigan, herein called first party, and Louis F. Breitenwischer and Fannie H. Breitenwischer, of Lansing, Ingham County, Michigan, herein called second party.

Witnesseth, as follows:

1. Said first party, in consideration of the sum of thirty-five thousand and no/100 dollars to be paid by second party to first party, and of the covenants to be performed by second party, as hereinafter expressed, hereby agrees to sell to second party, all that certain piece or parcel of land situate in the Township of Home, in the County of Montcalm and State of Michigan, described as follows, viz.:

The east one-half ($\frac{1}{2}$) of the east one-half ($\frac{1}{2}$) of section twenty-two (22), and the west one-half ($\frac{1}{2}$) of section twenty-three (23) in town twelve (12) north, range six (6) west, Montcalm County, Michigan.

It is understood by second party that there are three fields of rye to be harvested on the above described farm, of which he is to receive one-half of grain delivered at market, said second party to pay one-half of threshing bill and one-half of twine. Also one field of rye second party is to receive one-third of grain delivered at market without expense to him.

2. Said second party, in consideration of the covenants herein made by first party, agrees to purchase of first party, the above described premises, and to pay therefor to first party, or their legal representatives, at Grand Ledge, Mich., the sum of thirty-five thousand and no/100 dollars in manner as follows, viz.: Eighteen thousand three hundred and no/100 dollars on the signing and delivery of this contract and the balance of sixteen thousand seven hundred (\$16,700) dollars to be paid as follows: Two thousand (\$2,000) dollars thirty days from date; and a further payment of two thousand (\$2,000) dollars sixty days from date; and an additional payment of thirty-two hundred (\$3200.00) dollars ninety days from date, when the first party agrees to deed to second party the above described property subject to a real estate mortgage of ninety-five (\$9500.00) dollars together with interest on the whole sum that shall be from time to time unpaid, at the rate of six per cent. per annum,

to be computed from date hereof, and to be paid with principal. Principal or interest not paid when due shall bear interest until paid, at six per cent. per annum.

3. Said second party shall keep all buildings now on, or that may hereafter be placed on said premises, insured in the name of, and in manner and amount and by insurers approved by, first party, and leave the policy with first party, and in case of loss, the insurance, unless by mutual agreement used to repair or rebuild, shall be paid to first party and be endorsed on this contract to the extent of the amount unpaid thereon, and the balance, if any, shall belong and be paid to second party.

4. Said second party shall enter said premises for taxation in their name and shall well and faithfully pay when due, all taxes and assessments, ordinary and extraordinary, that may for any purpose be levied or assessed on said premises, Dec., 1915, and shall not commit or suffer any other person to commit any waste or damage to said premises or the appurtenances. Should second party fail to pay any tax or assessment when due, or to keep said buildings insured, first party may pay the same and have the buildings insured, and the amounts thus expended shall be a lien on said premises, be added to the amount then unpaid hereon, be due at once, and bear interest until paid, at six per cent. per annum.

5. Said first party further agrees that upon the full performance by second party of all covenants and agreements by second party to be performed, and upon the payment to first party of the several sums of money above mentioned, in time and manner and at the place mentioned, that thereupon first party will execute and deliver to second party a good and sufficient warranty deed, and thereby convey to second party the premises above described free and clear of all encumbrance except taxes after date hereof, and claims and liens thereon due to any act or neglect of second party.

6. All buildings and improvements now on, or that shall be placed or made on said premises, shall remain thereon as security for the performance by second party of this contract, and should default be made, and said contract be forfeited, said buildings and improvements and all payments made on said contract shall be forfeited to first party as stipulated damages for non-performance of this contract, or first party may at their option declare all sums unpaid immediately due and payable and enforce the collection thereof at law and make conveyance as aforesaid.

7. Said second party shall not assign or transfer this contract, or lease or sublet said premises, or the buildings thereon, or any part thereof, or add to or change said buildings without the previous written assent of first party thereto endorsed hereon.

8. It is further mutually agreed that second party may take possession of said premises at once and remain thereon as long as they shall perform all the covenants and agreements herein mentioned on their part to be performed, and no longer; and that if they shall at any time

hereafter, violate or neglect to fulfill any of said covenants or agreements they shall forfeit all right or claim under this contract, and be liable to be removed from said premises in the same manner as is provided by law for the removal of a tenant that holds over premises contrary to the terms of his lease, and notice to quit and of forfeiture are each hereby waived. And it shall be lawful for first party at any time after such default to sell and convey said premises, or any part thereof, to any other person without becoming liable to refund any part of the money received on this contract, or for any damages on account of such sale. And it is hereby expressly understood and agreed that time shall be deemed as of the very essence of this contract, and that unless the same shall, in all respects, be complied with by second party at the respective times, and in the manner above limited and specified, that second party shall lose and be debarred from all rights, remedies and actions, both at law and in equity, upon or under this contract.

Possession of this farm is to be given by first party subject to the rights of W. R. Roch & Co., of Hart, Mich., said lease expires March 1st, 1916.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

(In duplicate.)

James C. Walsh	(L. S.)
Inez V. Walsh	(L. S.)
Louis F. Breitenwischer	(L. S.)
Fannie H. Breitenwischer	(L. S.)

Signed, sealed and delivered in the presence of Leo. L. Wood, D. M. Krantz.

County of Ingham, }
State of Michigan, } ss.

On this 18th day of June in the year one thousand nine hundred and fifteen before me, the subscriber a notary public in and for said county, personally appeared James C. Walsh, Inez V. Walsh, Louis F. Breitenwischer and Fannie H. Breitenwischer to me known to be the same persons described in, and who executed the within instrument as vendor, who each acknowledged the same to be their free act and deed.

Moses Krantz,

Notary Public, Ingham County, Mich.

My commission expires May 9th, 1916.

(Exhibit B)—

Know all men by these presents, that we, James C. Walsh and Inez V. Walsh, husband and wife, of Grand Ledge, Michigan, as parties of the first part and in consideration of the sum of one dollar and other considerations, not herein stated, by Clinton Nelson of Alma, Michigan, as party of the second part, the receipt of which is hereby acknowledged, have sold, assigned, and transferred and do by these presents sell, assign, transfer and set over to the party of the second part, all our right title and interest in and to a certain land contract dated the 5th day of

June, A. D. 1915, made by the above named James C. Walsh and Inez V. Walsh, to Louis F. Breitenwischer and Fannie H. Breitenwischer of Lansing, Michigan, and hereto attached to said assignment.

In witness whereof we have hereunto set our hands and seals this 12th day of November, A. D. 1915.

James C. Walsh,
Inez V. Walsh.

In presence of C. F. Closson, Harry H. Partlow.

State of Michigan, }
County of Eaton, } ss.

On this 12th day of November, A. D. 1915, personally appeared before me, a notary public in and for said county, James C. Walsh and Inez V. Walsh, husband and wife, who each acknowledged the same to be their free act and deed.

Harry H. Partlow,
Notary Public, Eaton County

My commission expires Aug. 1st, 1918.

(d) Motion to Dismiss.—(Caption).

Now comes the above named defendants, Louis F. Breitenwischer and Fannie H. Breitenwischer, and moves the court now here for an order that the bill of complaint heretofore filed in this court in this cause be dismissed, and that this cause be dismissed with costs to the said defendants, for the following reasons:

1. Because it does not appear by said bill of complaint filed in said cause that the tax as provided for in Act No. 91 of the Public Acts of 1911 has been paid as in said act provided.

2. Because it does not appear by the copy of said contract as subjoined to said bill of complaint and marked Exhibit "A," that the special tax as provided for in Act No. 91 of the Public Acts of 1911 of the State of Michigan, has been paid.

3. Because it does not appear by said bill of complaint that the county treasurer for the County of Montcalm, State of Michigan, has certified on said land contract the amount secured thereby and the amount of tax received by him as is provided by Act No. 91 of the Public Acts of 1911 of the State of Michigan.

4. Because it does not appear by a copy of said land contract subjoined to said bill of complaint marked Exhibit "A" that such certificate certifying the amount secured by said contract and the amount of taxes received by said county treasurer for said county has been certified on said land contract by said county treasurer as is provided by Act No. 91 of the Public Acts of 1911, State of Michigan.

5. Because by the provisions of section 8 of Act No. 91 of the Public Acts of 1911 of the State of Michigan, it is provided that no mortgage or land contract which is subject to the tax imposed by said act shall be released, enforced, discharged, or recorded, or received in evidence in any action of proceeding in law or equity until the tax imposed thereon by said act shall be paid as in said act provided.

6. Because said bill of complaint does not show that said tax has been paid.

7. Because said land contract subjoined to said bill of complaint and marked Exhibit "A" does not show that said tax has been paid as in said act provided.

8. Because said tax has not been paid.

This motion is made in accordance with section 4 of chapter 14 of Public Act 314 of the Public Acts of 1915 of State of Michigan, known as the Judicature Act and it is intended to raise all questions properly raised thereunder, and also all questions as might heretofore be raised by demurrer.

This motion is founded on the facts as herein set forth and on the records and files in this cause.

Dated this 5th day of February, A. D. 1916.

Seymour H. Person,

Attorney for Defendants.

(e) Affidavit.—(Caption.)

County of Montcalm, ss.:

F. W. Bailey, being first duly sworn, deposes and says that he is Treasurer of Montcalm County, and as such is in charge of the books and records of said offices; that he has, as of March 6th, 1916, searched the records in such office to see if the tax has been paid as provided by Act No. 91 of the Public Acts of 1911 of the State of Michigan, on a certain land contract dated June 15, 1915, between James C. Walsh and Inez Walsh of Grand Ledge, Michigan, as first party, and Louis F. Breitenwischer and Fannie H. Breitenwischer of Lansing, Michigan, consideration \$35,000, and covering the east one-half ($\frac{1}{2}$) of east one-half ($\frac{1}{2}$) section 22, and west one-half of section 23, in town 12 north, range six (6) west, Montcalm County, Michigan, and that he finds from such records that said tax has not been paid.

F. W. Bailey.

Subscribed and sworn to before me, a notary public in and for said county, on the 6th day of March, A. D. 1916.

Agnes M. Disbrow.

Commission expires Oct. 29, 1919.

(h) Order.—(Caption.) At a session of said court held at the court house in the City of Stanton on Saturday, the 15th day of April, A. D. 1916.

Present: the Hon. Frank D. M. Davis, Circuit Judge.

The motion of defendants, praying that the bill of complaint filed and served in this cause be dismissed, having come on to be heard.

On reading the bill of complaint, the motion and listening to arguments of counsel made in open court, and being fully advised in the premises, it appears to court that the motion ought to be denied.

On motion of L. C. Palmer, attorney for plaintiff, it is ordered and adjudged that the motion of defendants be and the same is hereby denied and dismissed.

It is further ordered and adjudged, that in the defendants have fifteen days from date of service of a copy of this order in which to file and serve their answers to plaintiff's bill of complaint.

Frank D. M. Davis
Circuit Judge.

Countersigned:

Alfred L. Stearn,
Clerk.

L. C. Palmer.

Attorney for Plaintiff,

Business Address:
Stanton, Michigan.

The brief of plaintiff and defendant has not been included for the reason that the appeal has to do with the question of the mortgage tax law only.

The law of 1855 as to maintenance of bridges, was superseded and repealed by the passage of the Revision Act of 1909, and its technical repeal in 1915 was a mere formality; the act of 1909 is still in force under which we claim relief.

"Where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance." *Shannon v. People*, 5 Mich. 85.

CHAPTER XII

REFORMATION OF LAND CONTRACTS PLEADING AND PRACTICE LATE MICHIGAN CASES

§ 197. Reformation of Land Contracts.

§ 198. Illustrative Michigan Decisions.

§ 199. Mistakes of Law.

§ 200. Evidence.

§ 201. Bill of Complaint to Reform a Land Contract—Form.

§ 202. Decree Reforming Land Contract—Form.

§ 203. Pleadings and Briefs of Counsel Used in Late Michigan Cases Involving the Reformation of Instruments.

§ 197. Reformation of Land Contracts.—Whenever a contract has been drafted with the intention of carrying into execution an agreement previously made, but which by a mistake of the draftsman or scrivener, either as to law or fact, does not fulfill that intention, there is ground to correct the mistake by reforming the instrument and the question as to whether or not such a mistake has been made is a subject of inquiry open to parol testimony.¹

The reasons requiring a reformation are reduceable to two general classes:

1st: Cases where the contract, by its terms, includes subject matter which was not intended by the parties to come within its operation.

2nd: Those contracts, wherein by means of mistake, surprise or fraud some part of the subject matter intended to be included within the contract has been omitted.

In the first case, parol evidence is admissible to prove that the contract contains the subject matter. In the other case, parol evidence is admissible to prove that it does not contain all of the subject matter.²

§ 198. Illustrative Michigan Decisions — Reformation of

1. 34 Cyc. p. 910; LaBlanch v. Johnson, 214 Mich. 578; Murussa v. Perron, 209 Mich. 239; Clark v. Temerowski, 204 Mich. 271.

2. Pomeroy's Equity Jur. 865.

Land Contracts.—Where a scrivener in drawing a land contract inadvertently included the whole lot instead of the east one-half, parol testimony was admissible to establish such mistake and such evidence is not open to the objection that it tends to vary a written contract by parol. Equity has jurisdiction to reform such an instrument and if the property has been sold at the time of the action and the rights of innocent third parties have intervened, the court has authority to decree a lien on the unpaid purchase price due to the vendee from his assignee.³

It would also seem that if the purchase price had been fully paid to such vendee, then the court would have authority to enter a decree for damage in lieu of the decree for reformation.⁴

Where by a mutual mistake a land contract was executed, although the intent of the parties was merely to secure to the vendees therein an undivided one-half interest in the premises conveyed, they having advanced the money to make the purchase, a court of equity will correct the instrument so as to make it express the actual agreement.⁵

Before a land contract can be reformed to conform to the preliminary parol agreement which preceded it, the evidence of such preliminary agreement must be clear and convincing or relief by way of reformation will be denied.⁶

Where the word "heretofore" was inserted in a land contract providing for releases to the vendee on account of payments "heretofore made" was inserted through an error of the scrivener when the word "hereafter" was intended by both the parties, equity has authority to reform the instrument to express the true agreement of the parties.⁷

Where the description is defective and does not definitely define any land, the court has authority to reform the instrument so as to express the real agreement of the parties.⁸

3. *Clark v. Johnson*, 214 Mich. 577.

4. *Murrusa v. Temerowski*, 204 Mich. 271.

5. *LaBlanch v. Perron*, 209 Mich. 239.

6. *Baxter v. Ogossbevits*, 204 Mich. 249, 256.

7. *Johnson v. Wilson*, 11 Mich. 114.

8. *Burt v. Klixby*, 75 Mich. 311; *Probett v. Walters*, 70 Mich. 437; *DeWitt v. Tyler*, 49 Mich. 614.

Where by a mistake of the scrivener, the name of the wrong person was inserted in the instrument, equity has authority to grant relief and reform the instrument so as to make it speak what the parties intend.⁹

Where lands have been platted, a description of the same may be corrected by the court of equity in an action to reform the plat.¹⁰

Also where a rate of interest has been erroneously entered.¹¹

As well as where a sum has been wrongfully included in the consideration of an instrument.¹²

Where a parcel of land mutually intended to be included was omitted from a mortgage, by mutual mistake, equity will reform the instrument so as to include the omitted land.¹³

Equity will also grant relief and a contract for the sale of land will be reformed when the vendee, being illiterate, signed a contract providing for nearly double the agreed purchase price.¹⁴

And when in a land contract a reservation of the timber was inadvertently omitted, although agreed upon.¹⁵

Where words in an agreement have been omitted the instrument may be reformed to conform to the intention of the parties.¹⁶

Where a mistake has been made in fixing the boundary line of land and providing for a party wall, the agreement will be reformed in accordance with the actual understanding of the parties.¹⁷

§ 199. Reformation of Land Contracts—Mistakes of Law.—Where an instrument, by reason of a mistake of law, fails to express the contract which the parties actually entered

9. *Schuler v. Bomander*, 80 Mich. 531; *Baylon v. Hanover Fire Insurance Co.*, 67 Mich. 179.

10. *Gilbert v. Williams*, 157 Mich. 226.

11. *Fifth National Bank v. Pierce*, 117 Mich. 376.

12. *Gordon v. McGinnis*, 92 Mich. 97.

13. *Kimball v. Harrington*, 91 Mich. 281.

14. *Harrington v. Brewer*, 56 Mich. 301.

15. *Fero v. Loud & Sons Lbr. Co.*, 101 Mich. 310.

16. *Osterhant Lbr. Co. v. Rice*, 93 Mich. 353.

17. *Eberly v. Heaton*, 124 Mich. 205.

into, equity will grant appropriate relief, which may be either by way of refusing to enforce the agreement or by cancellation or by reformation, to the same extent as in the failure of the writing to express the real contract was caused by a mistake of fact.¹⁸

While the principle is often laid down that a mistake of law, when standing alone, affords no ground for relief in equity,¹⁹ nevertheless when such mistakes are made concurrently with fraudulent representations as to the law made by the person with whom complainant has had confidential relations, or is combined with a mistake in matters of fact, or with feebleness of mind caused by sickness, or where the adverse party has been active in inducing the mistake, equity will afford relief.²⁰

§ 200. Reformation of Land Contracts — Evidence. — The plaintiff in an action for the reformation of an instrument must establish that mistake has been made conclusively, and if the evidence is doubtful or is in conflict and not convincing, the bill of complaint will be dismissed.²¹

§ 201. Bill of Complaint to Reform a Land Contract.—The following is a form of bill of complaint to correct a mistake in the description of the property in a land contract.

(Address and Introduction.)

1st. That on or about the.....day of....., the plaintiff herein entered into an agreement to purchase from the defendant herein, the following described real estate, to-wit: (Here describe the real estate) for which this plaintiff then and there paid to the defendant the sum of..... Dollars, that being the full amount then and there due under said contract; the balance of said purchase price being payable at the rate of (here describe the terms of payment).

18. McGraw v. Muma, 164 Mich. 120.

19. Hughes v. Pealer, 80 Mich. 540; Tompkins v. Hollister, 60 Mich. 470; Lapp v. Lapp, 43 Mich. 287.

20. Tompkins v. Hollister, 60 Mich. 470; Tabor v. Mich. Mutual

Life Insurance Co., 44 Mich. 324; Renard v. Klinck, 91 Mich. 1.

21. McArthur v. Newhall, 106 Mich. 284; Dilly v. Longwell, 163 Mich. 439; Pasterno v. Longwell, 163 Mich. 439; Kinyon v. Cunningham, 146 Mich. 430.

2nd. That thereafter said agreement was reduced to writing, to-wit: on the.....day of....., and duly executed by the plaintiff and defendant, a true copy of such agreement being hereto attached, marked "Exhibit A" and made a part hereof. That through a mistake of the scrivener in drafting said land contract, the premises were erroneously described therein (here insert erroneous description) instead of (here insert the correct description) as was intended by both the plaintiff and said defendant. That thereafter said contract as duly delivered, this plaintiff retaining a duplicate copy and payments have been made thereon by this plaintiff from the date of the execution of such contract until the present date, in accordance with the tenor of said agreement. That plaintiff did not discover said mistake until on the.....day of.....

3rd. That upon a discovery of such mistake in the description of said property, plaintiff went to the vendor and demanded a correction of the same which vendor then and there refused to make and still continues to refuse to correct the description in such contract.

4th. That by reason of said mistake in the description of said land, this plaintiff is unable to sell or dispose of his interest therein or any part thereof and that he will be unable to compel a conveyance of the land which he contracted for and intended to buy.

Wherefore Plaintiff Prays:

1st. That said error and mistake in said land contract may be corrected and said land contract reformed so as to duly describe the land and premises intended to have been then and there described and included in such land contract.

2nd. That this plaintiff may be decreed to be the equitable owner of said land intended to have been included in said land contract and further that said defendant be required to execute a land contract containing the correct description of said premises and deliver the same to this plaintiff.

3rd. That plaintiff may have such further, other and different relief in the premises as may be agreeable to equity and good conscience.

And this plaintiff will ever pray.

 Attorney for Plaintiff.

§ 202. Form of Decree Reforming Land Contract.

STATE OF MICHIGAN
 IN THE CIRCUIT COURT FOR THE COUNTY OF.....
 IN CHANCERY

At a session of said Court held in the Court House in the
 (here insert place) in said county on the.....day of
, in the year of our Lord one thousand nine hun-
 dred and

PRESENT, The Honorable.....

Circuit Judge.

The above entitled cause having come on to be heard upon
 the pleadings and proofs taken therein, the Court having heard
 the testimony and the arguments of counsel for the respective
 parties and being fully advised in the premises, doth find.

1. That all the material allegations of the plaintiff's Bill of
 Complaint are true and have been established by the evidence.

NOW, THEREFORE, on due consideration thereof, it is
 ORDERED, ADJUDGED and DECREED, and the Court now
 here doth hereby ORDER, ADJUDGE and DECREE that said
 land contract heretofore executed and delivered by (here insert
 name of party of first part) as party of the first part and (here
 insert name of party of second part) as party of the second
 part, and recorded in Liber on Page.....in the Office of
 the Register of Deeds of.....County, be, and the same
 is hereby reformed in the following particulars: The descrip-
 tion of the premises described therein shall read as follows,
 to-wit: (here insert the correct description).

It is further ORDERED, ADJUDGED and DECREED that
 the plaintiff may record this decree with the Register of Deeds
 of.....County and upon the due registration of such de-
 cree, the same shall be notice to all parties of the reformation
 of said instrument in accordance with the terms hereof.

 Circuit Judge.

§ 203. Pleadings and Briefs Used in Late Michigan Cases Involving Reformation of Land Contracts.—

CLARK v. JOHNSON, 214 Mich. 578—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Answer of Defendants Johnson.
- (d) Answer and Cross-Bill of Defendants Rogerson.
- (e) Answer of Defendants Johnson to Cross-Bill of Defendants Rogerson.
- (f) Answer of Plaintiff to Cross-Bill of Defendant Rogerson.
- (g) Court's Opinion.
- (h) Decree.
- (i) Authorities Cited by Defendants Johnson—Brief for Defendants Johnson.
- (j) Authorities Cited by Plaintiff—Brief for Plaintiff.

CLARK v. JOHNSON, 214 Mich. 578—

(a) Brief Statement of Fact.—A bill of complaint was filed to reform a land contract wherein the scrivener in drawing the contract included the whole lot instead of the east one-half, and the vendee, although aware of this mistake, attempted to convey the whole lot to third parties. A decree for plaintiff was entered which was affirmed on appeal of defendants.

(b) Bill of Complaint.—(Caption.) Frank L. Clark and Hannah Clark, his wife, respectfully show unto the court as follows, to-wit:

1. That they are husband and wife and reside in the Village of Birmingham, Oakland County, Michigan, and are of the age of 21 years and upwards.

2. That theretofore, to-wit, on or about the 17th day of August, in the year one thousand nine hundred and sixteen, they acquired title by warranty deed from Warren Clizbe and wife of the following described property, to-wit:

The east one-half and the west one-quarter of a parcel of land situate in the southwest quarter of the southeast quarter of the northeast quarter of section 36, town 2 north, range 10 east, beginning at an iron stake on the south line of Landon street 84 feet west from an iron stake at the northern apex of lot 16, Grove plat, thence westerly on south line of Landon street 80 feet, to an iron stake, thence south 104 feet and 7 inches to an iron stake, which is 106 feet north of north line of Lincoln avenue, thence east parallel with Lincoln avenue 80 feet, to an iron stake, thence north to Landon street at the point of beginning.

Situated in the Village of Birmingham, Oakland County, Michigan, as appears by the terms of a certain warranty deed dated August 17, 1916, and recorded in the office of the Register of Deeds for Oakland County, in Liber 288 of deeds on page 257; reference being had thereto for greater certainty.

3. And these plaintiffs further show unto the court that on or about the 28th day of October, 1916, they entered into a land contract with Abner T. Klees and Mabel Klees, his wife, of Birmingham, Michigan, for the sale of the easterly 40 feet of the lands described in said deed, and that the said Abner T. Klees and Mabel Klees, in pursuance of said land contract, went into possession of said premises. That said land contract was duly recorded in the office of the register of deeds for the county of Oakland on the 1st day of February, 1918, in Liber 312 of deeds, pages 449 and 450; reference being had thereto for greater certainty. That at the time said contract was drawn, there was an error in the description of the lands intended to be sold and contracted for. That it was the intent and the express understanding and agreement of all the parties, that plaintiffs were contracting to convey, and Abner T. Klees and wife were contracting to purchase the easterly 40 feet of said 80 foot strip; that the scribner, who drew the contract, by mistake copied the entire description in the deed, so that the contract purported to convey the east one-half and also the west one-half of said parcel of land. That the said Abner T. Klees and wife, however, understood that they were purchasing the east 40 feet of said property as appears by their affidavit recorded in the office of the Register of Deeds for Oakland County in connection with said land contract in Liber 312 of deeds, on page 449; reference being had thereto for greater certainty.

4. That thereafter the said Abner T. Klees and Mabel Klees, his wife, assigned their interest in said land contract to Walter F. Johnson of Birmingham, Michigan. That the time said assignment was made of said interest to the said Walter F. Johnson and Esther R. Johnson, his wife, that it was clearly understood and agreed on the part of the said plaintiffs and the said Abner T. Klees and wife and the said Walter F. Johnson, and Esther R. Johnson, his wife, that the interest which the said Abner T. Klees and wife had in said property was an interest in the easterly 40 feet only and such assignment of said interest in said land contract was made with that express understanding and agreement and the said assignment was accepted and received by the said Walter F. Johnson and Esther R. Johnson, his wife, with the full knowledge and understanding on their part that said assignment did not include and that said contract did not include the entire 80-foot parcel of land, but that it only included the easterly 40 feet and in spite of the error in the drawing of the contract, the said Walter F. Johnson and Esther R. Johnson, his wife, were not deceived thereby but knew at the time and at all times that they were acquiring an interest in only the easterly 40 feet of said premises.

5. That notwithstanding the knowledge on the part of the said Walter F. Johnson and Esther R. Johnson, his wife, that they had acquired no interest in said property except the easterly 40 feet thereof, and that the said plaintiffs had only contracted to convey the easterly 40 feet thereof, the said Walter F. Johnson and Esther R. Johnson, his wife, with intent to defraud, harm, injure, and cheat these plaintiffs out of their

said property, thereafter contracted with Gordon Rogerson and Emily R. Rogerson, his wife, to sell and convey, for a valuable consideration, all of the said above described lands, both the easterly and westerly half thereof and that the said Walter F. Johnson and Esther R. Johnson, his wife, and the said Gordon Rogerson and Emily Rogerson, his wife, had full knowledge and well knew that the said plaintiff had never sold or agreed to sell any portion of said premises, except the easterly 40 feet thereof; yet, the said Walter F. Johnson and Esther R. Johnson and the said Gordon Rogerson and the said Emily Rogerson, defendants herein, seeking to take advantage of the mistake of the scribner in the said land contract above referred to from plaintiffs to Abner T. Klees and wife, and seeking to cheat and defraud these plaintiffs out of their property, sought by means of the land contract between the said Walter F. Johnson and wife and the said Gordon Rogerson and wife to acquire title to the entire parcel of land and the said Gordon Rogerson and wife, by virtue of said contract with the said Walter F. Johnson and wife, have claimed to be the owner by contract of said entire parcel and so claim at this time. That they have sought to exercise the rights of ownership and possession in spite of the protest of these plaintiffs over said entire parcel of land; that they claim to be entitled to the possession of the entire parcel of property and all of said defendants refuse to permit the mistake to be corrected or rectified or the contracts modified to conform to the intention of the parties and the real facts in the case.

6. That in truth and in fact, the said defendants all knew and have always known, since the assignment of said contract of Abner T. Klees and wife to Walter F. Johnson and wife, what the real intention of the parties was and that these plaintiffs never sold or contracted to sell anything except the easterly 40 feet of said property.

7. Yet, notwithstanding this knowledge on the part of said defendants, they have wrongfully, fraudulently and intentionally taken possession of all of plaintiff's property and claim to be the owners thereof, and said defendants, wrongfully and with intent to cheat and defraud these plaintiffs are detaining and seeking to detain and claiming to own the said westerly 40 feet of said parcel of land.

8. That the contract existing between these plaintiffs and Abner T. Klees and Mabel Klees, as assigned to Walter F. Johnson and wife, defendants herein, and the contract between Walter F. Johnson and wife and Gordon Rogerson and wife, defendants herein, should be corrected, modified, and changed to conform to the real facts and so as to describe the easterly 40 feet of said parcel of land only and the said defendants should be enjoined by an injunction of this court from selling, contracting to sell, keeping or claiming to own the westerly 40 feet of said parcel of land, or from excluding or attempting to exclude these plaintiffs from their full title, occupancy and possession of said westerly 40 feet of said parcel of land.

9. That the value of the land in question is in excess of one hundred dollars and that these plaintiffs are without relief in the premises save in a court of equity.

10. In consideration whereof and to the end therefore, these plaintiffs pray:

(a) That the said Walter F. Johnson and Esther R. Johnson, Gordon Rogerson and Emily Rogerson, defendants herein, may each of them, without oath, their answer upon oath being hereby waived, full, true, direct, and perfect answer make to all and singular the matters herein stated and charged.

(b) That the contract between these plaintiffs and Abner T. Klees and Mabel Klees, his wife, assigned to Walter F. Johnson and Esther R. Johnson, his wife, may be corrected, changed, and modified so as to describe the easterly one-half of the parcel of land therein referred to; said contract being recorded in Liber 312 of deeds, on pages 449 and 450 Oakland County Register of Deeds office.

(c) That the contract or agreement of sale between Walter F. Johnson and Esther R. Johnson, his wife, and Gordon Rogerson and Emily Rogerson, his wife, may be changed, corrected and modified so as to describe the easterly 40 feet of the land described and referred to in the contract mentioned in Subdivision B of the prayer for relief in this bill.

(d) That the said defendants, jointly and severally, may be restrained and enjoined by this court from selling, assigning, transferring, encumbering, leasing, or exercising any rights of ownership over the westerly 40 feet of the lands described in this bill of complaint or from claiming any right, title, or interest therein by virtue of the contract in existence between the plaintiffs in this cause and Abner T. Klees and Mabel Klees, his wife, or by virtue of any contract or sales agreement now in existence between the defendants herein.

(e) That the said defendants, jointly and severally, may be restrained and enjoined from interfering with plaintiff's right of possession, entry and from the exercise of authority and ownership in, to and over the westerly 40 feet of said above described parcel of land.

(f) That these plaintiffs may have such other and further relief in the premises as may be agreeable to equity and good conscience.

And these plaintiffs will every pray.

Frank L. Clark,
Hannah Clark.

A. L. Moore,
Attorney for plaintiffs,
Pontiac, Michigan.
(Verification.)

Amendment to Bill of Complaint.—(Caption.) Now come the plaintiffs, by their attorney Andrew L. Moore, and moves the court to enter an order granting permission to plaintiffs to amend the prayer contained in the bill of complaint on file in said cause by adding thereto the following section:

"Section H. That in the event the court finds that loss or injury would result to Gordon Rogerson and Emily Rogerson, defendants herein, if the contract between plaintiffs and Abner T. Klees and Mabel M. Klees, which contract was assigned to Walter F. Johnson be reformed, and further finds that the said Gordon Rogerson and Emily Rogerson, are innocent purchasers in good faith of the entire eighty feet of said premises from the said Walter F. Johnson and wife, then in that event, these plaintiffs pray that the court may determine the cash value of the said westerly 40 feet of land and that the said defendants, Walter F. Johnson, and his wife, Esther R. Johnson, may be decreed to pay to these plaintiffs in cash an amount equal to the value of said westerly 40 feet as determined by said court in lieu of having said land contract reformed as herein prayed for, and that these plaintiffs may be decreed to have a lien in the nature of a mortgage upon said easterly 40 feet of the premises described in paragraph two of this bill of complaint to secure the payment thereof and that said sum shall be deemed to be due and payable forthwith; and that in the event of a decree for the cash value of said westerly 40 feet, that plaintiffs be decreed to be entitled to their reasonable costs and charges to be taxed against the said Walter F. Johnson, and Esther R. Johnson."

A. L. Moore

Attorney for plaintiffs

Dated July 9, 1919.

(c) Answer of Walter F. Johnson and Esther R. Johnson.—(Caption.) Walter F. Johnson and Esther R. Johnson, defendants herein, answering the bill of complaint filed in said cause, respectfully show unto said court as follows:

I. These defendants admit the allegations of paragraph one of said bill of complaint.

II. These defendants have not sufficient information to admit or deny the allegations of paragraph two, and therefore neither admit nor deny the same, but leave plaintiffs to the proof.

III. In answer to paragraph three of said bill of complaint these defendants say:

They admit that plaintiffs entered into a contract with Abner T. Klees and wife, under date of October 28, 1916, but deny that the contract was for the sale of the easterly forty (40) feet of the land; that as to the remainder of said paragraph, these defendants have not sufficient information to form a belief and therefore neither admit nor deny the same, but leave plaintiffs to their proof.

IV. In answer to paragraph four of said bill of complaint these defendants say:

They admit that Abner T. Klees and Mable Klees, his wife, assigned their interest in a contract for the sale of lands described in paragraph two, to these defendants, but deny that there was an understanding that said Klees and wife had an interest in only 40 feet of said land, and

that the assignment was made with that understanding, and deny that they had any knowledge except such as was expressed in the contract itself.

V. In answer to paragraph five of said bill of complaint, these defendants say: These defendants deny any knowledge other than that expressed in the written agreement between Abner T. Klees and wife and plaintiffs, which agreement was duly and legally assigned to these defendants and consented to by plaintiffs, they deny that there was any intention on the part of these defendants of defrauding, harming, injuring and cheating plaintiffs out of their said property.

That they, under date of December 5, 1917, entered into a contract with Gordon Rogerson and Emily Rogerson, his wife, to sell and convey to them the aforesaid lands for the total consideration of five thousand (\$5,000) dollars.

They deny that these defendants knew that plaintiffs were selling the easterly 40 feet of said land, and deny that they were seeking to take any advantage whatever of said plaintiffs; they admit they claimed to be the owner of the eighty feet, and admit that they refused to permit the alleged mistake to be corrected, as there was no mistake or misunderstanding on the part of these defendants.

VI. In answer to paragraph six of said bill of complaint, these defendants say: That if the intention was any different from that expressed in the contract, they had no knowledge of it, and they deny that they purchased anything other than the contract expressed on its face.

VII. In answer to paragraph seven of said bill of complaint, these defendants say: They deny that there was any wrong or fraud involved in the transaction itself, and while they claim to own eighty (80) feet of land, instead of forty (40) feet, it is because that was the quantity purchased.

VIII. In answer to the eighth paragraph of said bill of complaint, these defendants deny that the contract should be modified or changed in any respect whatever; that if any mistake was made in the contract prior to its delivery to Abner T. Klees, these defendants had no knowledge of it, and the mistake was one that plaintiffs themselves made, and that the defendants herein are innocent parties, and should not be called upon to suffer for the mistake made by plaintiffs.

IX. These defendants admit the allegations set forth in the ninth paragraph of said bill of complaint.

X. These defendants further say that in the contract entered into between plaintiffs and Abner T. Klees and Mabel Klees, his wife, under date of October 28, 1916, it appears that the said Klees and wife were paying therefor the total consideration of three thousand four hundred dollars; that at the time of the purchase by these defendants, they paid Klees and wife four thousand five hundred dollars for the property, which sum would be a reasonable consideration for eighty feet of land described in said bill.

Said Klees and wife thereby making a profit of one thousand one hundred dollars upon the sale thereof; that this sale was consummated under date of November 3, 1917, as shown by copy of assignment hereto attached and made a part hereof, the original of which will be produced and proved as this court may direct; that at the time this assignment was made, it was duly consented to by plaintiffs as shown by the assignment, that thereafter from the date of said assignment, and up to the present time, said plaintiffs received and are continuing to receive payments upon the contract, in accordance with its terms, that said plaintiff Frank L. Clark was fully advised as to the transaction between these defendants and Abner T. Klees, at the time it took place, and participated in the transaction and well knew the provisions of the contract assigned to these defendants.

These defendants not confessing nor admitting that any matter, cause or thing in the said bill contained, and not hereby sufficiently answered, is true to their knowledge or belief deny that said plaintiffs are entitled to any relief against them or either of them by reason of anything said bill contained, and prays to be hence dismissed with their costs in this behalf sustained.

Walter F. Johnson,
Esther R. Johnson,
By John J. Gaff, Their attorney.

(c) Answer of Walter F. Johnson and Esther R. Johnson to Amendment to Bill of Complaint.—(Caption.) Now come the defendants, Walter E. Johnson, and Esther R. Johnson, defendants herein, in answer to the amendment to the said bill of complaint for further answer show unto the court as follows:

The said plaintiffs, Frank L. Clark and Hannah Clark, his wife, are not entitled to the relief prayed for in Section H of said amended bill of complaint, as said plaintiffs had knowledge prior to the sale to Gordon Rogerson, and Emily R. Rogerson that said sale was to be made, and said plaintiffs did not make known to said defendants their intention to question said sale or interfere with the same, but permitted the said defendants, Walter F. Johnson and Esther R. Johnson, to make sale without objection, and are estopped from setting up any claim as against said defendants, Walter F. Johnson and Esther R. Johnson, for reimbursement for the westerly 40 feet referred to in said Section H, being the 40 feet in question in this action. That said plaintiffs are not entitled to any relief because of their carelessness in making said contract and because said defendants, Walter F. Johnson and Esther R. Johnson, are innocent purchasers of the eighty feet agreed to be conveyed by the terms of said contract, and had no knowledge or notice prior to the sale to them of said eighty feet. The said plaintiffs consented to the assignment to said Walter F. Johnson and Esther R. Johnson with full knowledge of the description set forth in said con-

tract. And further answering said bill of complaint, these defendants say that said plaintiffs are not entitled to the relief prayed for the reason that the contract specifies the manner and form of payments to be made, and said defendants would be subjected to great hardship and loss if required to pay in cash any sum whatever, and above the amount specified in said contract.

Walter F. Johnson

Esther R. Johnson.

John J. Gaffill,

Attorney for Walter F. Johnson and

Esther R. Johnson.

(d) Answer of Gordon Rogerson and Emily Rogerson.—(Caption.) Gordon Rogerson and Emily Rogerson, defendants herein, answering the bill of complaint herein, respectfully show unto the court as follows:

I. These defendants having no knowledge of the allegations of paragraphs one, two, three and four of said bill of complaint, neither admit nor deny same, but leave plaintiffs to their proofs.

II. Answering paragraph five of said bill of complaint, these defendants admit that they made a contract with Walter F. Johnson, and Esther R. Johnson, his wife, for the purchase of the premises described in paragraph two of said bill of complaint, which contract is hereto attached and marked Exhibit A.

They admit that they claim to be the owners by contract of said entire parcel; that they seek to exercise the rights of ownership and possession over said entire parcel of land; that they claim to be entitled to the possession of the entire parcel of property. They admit that they refuse to surrender their rights in 40 feet of the said property. These defendants deny all of the other allegations contained in paragraph five.

III. They deny the allegations of paragraph six.

IV. They admit that they have taken possession of all of said property and claim to be the owners thereof by contract; but they deny that their actions are wrongful or fraudulent.

V. They deny the allegations of paragraph eight of said bill of complaint.

VI. They admit that the value of the land in question is in excess of \$100.00.

And these defendants, seeking affirmative relief, by way of cross-bill, respectfully show unto the court as follows:

1. That they are husband and wife and are residents of the Village of Birmingham said county and state.

2. That on to-wit, the 5th day of December, A. D. 1917, they executed a certain land contract in which they appear as vendees and said defendants Walter F. Johnson and Esther R. Johnson appear as vendors, whereby said vendors, for the consideration of \$500 agreed to sell the premises described in paragraph two of the bill of complaint filed herein

a copy of said contract being hereto attached and marked Exhibit A. That said defendant Walter F. Johnson informed your orators that he was purchasing the land from Frank L. Clark and wife. Your orators read over said contract before signing same, and also gave the proposition considerable thought before finally executing said contract. They would not have purchased said property if they had supposed they were purchasing only 40 feet thereof. That before the execution of said contract, said defendant, Walter F. Johnson, read said contract out loud to your orators. That there never was any question as between said defendant Clark and your orators that the property in question had a width of 80 feet.

3. That said plaintiff, Frank L. Clark, had knowledge that your orators believed they were purchasing the entire eighty feet of said premises, not later than February in the year 1918; but that he took no action until the filing of the bill of complaint in this action on the 21st day of August, A. D. 1918.

4. Your orators further state that they had absolutely no knowledge and no means of knowledge that plaintiffs in this cause claimed 40 feet of said premises until several months after the execution of said contract. That your orators acted in good faith, were bona fide purchasers for value, and took it for granted, from the wording of said contract, that they were purchasing 80 feet of said premises. And your orators further state that the mistake in the description of said premises, assuming that there ever was a mistake, was the fault of said plaintiffs, and that as between your orators and said plaintiffs, said plaintiffs sought in equity to bear the burden of their own mistake.

5. That the present proceedings will constitute a cloud upon the title of your orators, unless a decree be entered, affirming their rights to purchase the entire 80 feet of said premises in accordance with the terms of their contract.

Forasmuch as your orators are without relief save in a court of equity, they pray:

(a) That said plaintiffs, Frank L. Clark, and Hannah Clark, and said defendants, Walter F. Johnson and Esther R. Johnson, may each of them, without oath, make full, true, direct and perfect answer to the allegations of this, your orators' cross-bill.

(b) That said plaintiffs and said defendants may be restrained and enjoined by this court from selling, assigning, transferring, encumbering, or exercising any rights of ownership over the premises hereinbefore described, contrary to the contract rights of your orators.

(c) That the contract between your orators and said defendants, Walter P. Johnson and Esther R. Johnson, may be decreed to be valid and to express the intention of the parties thereto; and that the contract between the said plaintiffs and Abner T. Klees and Mabel Klees, his wife, assigned to Walter F. Johnson, may be upheld and enforced in

favor of your orators, according to the letters and terms thereof, as affecting the entire 80 feet frontage of said premises.

That your orators may have such other and further relief in the premises as may be agreeable to equity and good conscience.

Gordon Rogerson,

Emily Rogerson,

Carey, Armstrong & Weadock,

Attorneys for Gordon Rogerson and

Emily Rogerson.

(d) Amendments to Answer and Cross-Bill of Defendants Rogerson.—(Caption.) First: In paragraph II of said defendants' cross-bill, lines 7, 8 and 9, strike out the following sentence, "That said defendant, Walter F. Johnson, informed your orators that he was purchasing the land from Frank L. Clark and wife."

Second: In paragraph II, the second line from the bottom of page 2, strike out the word "Clark" and substitute the word "Johnson."

Gordon Rogerson,

Emily Rogerson,

By Carey, Armstrong & Weadock,

Their attorneys.

(e) Answer of Walter F., and Esther R. Johnson to Cross-Bill of Defendants Rogerson.—(Caption.) Walter F. Johnson and Esther R. Johnson, answering the cross-bill of defendants, Gordon Rogerson and Emily Rogerson, say:

1. They admit the allegations of paragraph one of said cross-bill.

2. They admit that a contract was entered into between these defendants and cross-plaintiffs, as alleged in said cross-bill, but do not know whether considerable thought was given the matter or not, but whether said cross-plaintiffs would have purchased the property if there had been but 40 feet, these defendants cannot admit or deny, but leave cross-plaintiffs to their proof.

3. They admit the allegations of paragraphs three, four and five of said bill of complaint, and admit that said defendant is entitled to the relief prayed for.

Walter F. Johnson,

Esther R. Johnson,

By John J. Gaffill,

Their attorney.

John J. Gaffill,

Attorney for Walter F. Johnson and

Esther R. Johnson.

(f) Answer of Plaintiffs to Defendants Gordon Rogerson's and Emily Rogerson's Answer in the Nature of Cross-Bill.—(Caption.) Plaintiffs, in the above entitled cause, answering defendants Gordon Rogerson and Emily Rogerson, answering in the nature of cross-bill, say:

1. They admit the allegations in paragraph one of defendants' cross-bill.
2. They neither admit nor deny the allegations contained in paragraph two and leave the defendants to prove the same as they have in their cross-bill alleged.
3. Plaintiffs deny each and every material allegation alleged in paragraph three.
4. Plaintiffs deny each and every material allegation contained in paragraph four of said cross-bill.
5. Plaintiffs deny that defendants are entitled to the relief prayed for and pray that the said cross-bill may be dismissed and the relief prayed for therein denied.

Frank L. Clark,
Hannah Clark,
Plaintiffs.

Dated September 26, 1918.

A. L. Moore,
Attorney for plaintiffs,
Pontiac, Michigan.

(g) Court's Opinion.—(Caption.) Bill of complaint as originally filed in this cause, prayed for the reformation of a certain land contract and asked that the westerly 40 feet of the land described in the bill of complaint may be decreed to be the property of plaintiff. An amendment was subsequently made to the bill of complaint, praying that:

“In the event the court finds that loss or injury would result to Gordon Rogerson and Emily Rogerson, defendants herein, if the contract between plaintiffs and Abner T. Klees and Mabel M. Klees, which contract was assigned to Walter F. Johnson, be reformed, and further finds that the said Gordon Rogerson and Emily Rogerson are innocent purchasers in good faith of the entire 80 feet of said premises from the said Walter F. Johnson and wife, then in that event, these plaintiffs pray that the court may determine the cash value of the said westerly 40 feet of land and that the said defendants, Walter F. Johnson and his wife, Esther R. Johnson, may be decreed to pay to these plaintiffs in cash an amount equal to the value of said westerly 40 feet as determined by said court in lieu of having said land contract reformed as herein prayed for, and that these plaintiffs may be decreed to have a lien in the nature of a mortgage upon said easterly 40 feet of the premises described in paragraph two of this bill of complaint to secure the payment thereof and that said sum shall be deemed to be due and payable forthwith; and that in the event of a decree for the cash value of said westerly 40 feet, that plaintiffs be decreed to be entitled to their reasonable costs and charges to be taxed against the said Walter F. Johnson and Esther R. Johnson.”

An answer and cross-bill is filed by the respective defendants contending that they acted in good faith in the various transactions alleged therein and that plaintiff is without remedy in a court of equity.

At the hearing it was substantially conceded that the defendants, Gordon Rogerson's and Emily Rogerson's contention was correct, and that they having purchased the entire premises in good faith, that they should not be disturbed in carrying out the terms of their contract with defendant Johnson in acquiring the entire premises.

The controversy in this case grows out of a peculiarly worded description of real estate which describes "the east one-half and the west one-half of a parcel of land, etc.," which taken as a whole includes an 80-foot lot. This lot was acquired by plaintiff, August 17, 1916, from one Clizbe containing this peculiar description in the deed. On the 28th of October, 1916, plaintiff sold on a land contract the easterly 40 feet of this lot to one Abner T. Klees and Mabel Klees, his wife, and made arrangements with the vendees to erect them a dwelling house upon this parcel. The scrivener who drew the contract, however, included the whole description, viz.: "The east one-half and the west one-half" in the contract; his testimony being, however, that he used the description furnished him by the vendor, Mr. Clark. Subsequently Mr. Klees and wife arranged to sell their contract to Walter F. Johnson, one of the defendants herein, and accepted as payment for the same an automobile and a check for the balance. The transaction was evidenced by an assignment of their land contract to Mr. Johnson on the 3rd of November, 1917.

The testimony establishes the fact that at the time this assignment was made and before the keys to the automobile had been delivered and before the check had been cashed by Mr. Johnson, that he was advised by the scrivener Mr. Cobb, Mr. Clark, Mr. Campbell and Mr. Valentine, the latter being agents for the respective parties, that he was acquiring the property owned by Mr. Klees, which included only the east 40 feet of this description, and not the westerly 40 feet. This fact, according to the testimony, was clearly brought to Mr. Johnson's attention and was made plain to him just what Mr. Klees actually owned.

It is therefore evident that this erroneous description was known to both Mr. Clark, Klees and Johnson when the contract of sale was assigned to Mr. Johnson. On the 5th of December, 1917, defendant Johnson sold to Gordon Rogerson and Emily Rogerson, his wife, by executing a new land contract the entire 80 feet of said property, using the original erroneous description. It appears that at the time of this conveyance the Rogersons knew nothing of the irregularity in the contract description between Clark and Johnson and acted in good faith in making the purchase of the entire property from Mr. Johnson. The proofs show that at the time the property was originally sold by plaintiffs to Klees, that the westerly 40 feet (the parcel in controversy) was worth substantially \$650.00. The proof also shows that at the present time it is worth a sum considerable in advance of this amount, to-wit, \$1100.00, the amount that plaintiff now claims should be recompensed from defendants.

I find that the defendants Rogerson and wife acted in good faith in their transaction and are entitled to have the contract carried out with defendant Johnson, with costs taxable against him. Plaintiff Clark is entitled to the value of the westerly 40 feet from defendant Johnson valued at the time he erroneously conveyed the same to Klees and wife, which is found to be, with interest at the rate of six per cent., \$713.00. I am not able to accept plaintiff's claim that he is entitled to the present value of the disputed property for the reason he failed to act timely in correcting the mistake that was repeatedly called to his attention, and which he is largely responsible for causing in the original transaction. Plaintiff is also entitled to a lien for this amount upon the land contract from Johnson to Rogerson and wife, together with costs against Johnson. The contract from Johnson to Rogerson, including the entire 80 feet is to be carried out if its terms are complied with, and plaintiff Clark instructed to join in a deed of the entire premises if requested so to do.

Decree is so ordered.

Kleber P. Rockwell,
Circuit Judge.

Dated this 4th day of October, A. D. 1919.

And afterwards, on the 5th day of November, A. D. 1919, said Circuit Court made its decree therein in favor of the said plaintiffs and against the said defendants Walter F. Johnson and Esther R. Johnson, which said decree was as follows:

(b) Decree.—(Caption.) At a session of said court held at the court house in the City of Pontiac, Michigan, on the fifth day of November, 1919.

Present: Hon. Kleber P. Rockwell, Circuit Judge.

This cause having come on for hearing upon the pleadings and proofs taken in open court, and after hearing the testimony and counsel for the respective parties, and the court being fully advised in the premises, and it satisfactorily appearing to the court that the material facts charged in said bill of complaint are true, and that the said defendant, Walter F. Johnson, was not an innocent purchaser of "The east one-half and the west one-half of a parcel of land situated in the southwest quarter of the southeast quarter of the northeast quarter of section 36, town 2 north, range ten east, beginning at an iron stake on the south line of Landon street, 84 feet west from an iron stake at the northern apex of lot sixteen (16), Grove plat, thence westerly on the south of Landon street, 80 feet to an iron stake, thence south 104 feet 7 inches to an iron stake, which is 106 feet north of the north line of Lincoln avenue, thence east parallel with Lincoln avenue, 80 feet to an iron stake, thence north to Landon street at the point of beginning. Being in the Village of Birmingham, Oakland County, Michigan.

And it further appearing to the court that Gordon Rogerson and Emily Rogerson, his wife, are innocent purchasers of said above described tract from the said Walter F. Johnson and Esther R. Johnson, his wife,

and that their contract interest in said premises cannot be disturbed without injury to the said Gordon Rogerson and Emily Rogerson.

It is therefore ordered, adjudged and decreed that the land contract heretofore executed and now existing between the said Walter F. Johnson and Esther R. Johnson, his wife, parties of the first part, and Gordon Rogerson and Emily Rogerson, his wife, parties of the second part, be and the same is hereby confirmed in its entirety and decreed to be a valuable contract for the sale of the entire 80 feet of land, and that the said Gordon Rogerson and Emily Rogerson, his wife, are entitled to conveyance of said premises as provided for in said contract upon complying with the terms of said contract.

It is further ordered, adjudged and decreed that the said bill be dismissed as to the said Gordon Rogerson and Emily Rogerson, his wife, and Hannah Clark, and Abner T. Klees and Mabel Klees, which contract Walter F. Johnson; the costs to be taxed by the clerk of this court.

It is further ordered, adjudged and decreed that the said defendant Walter F. Johnson pay to the said plaintiffs Frank L. Clark and Hannah Clark, in lieu of a modification of the contract between Frank L. Clark and Hannah Clark, and Abner T. Klees and Mabel Klees, which contract was assigned to Walter F. Johnson, the sum of seven hundred thirteen (\$713.00) dollars, which sum is based upon the value of the westerly 40 feet of said land, with interest to date.

It is further ordered, adjudged, and decreed, that to secure the payment of said sum with interest, and the taxable costs to which plaintiffs are entitled, that plaintiffs shall have a lien upon the entire tract so sold by defendants Johnson and wife to Gordon Rogerson, and wife, and shall also have a lien upon the moneys due and hereafter to become due from the said Gordon Rogerson and wife to the said Walter F. Johnson and wife upon the land contract between said defendants Johnson and wife, to the said Rogerson and wife, and that in the event that the said sum of seven hundred thirteen dollars with interest and the taxable costs are not paid as herein provided, that the said plaintiffs may enforce said lien in the manner provided by law for the collection of judgments, either on the chancery or law side of courts of record.

It is further ordered, adjudged and decreed that the said plaintiffs recover their taxable costs to be taxed by the clerk of this court against the said defendants Walter F. Johnson and Esther R. Johnson.

It is further ordered, adjudged and decreed that upon the payment of the said sums as herein provided that the said land contract from Frank L. Clark and Hannah Clark, his wife, to Abner T. Klees and Mabel Klees, his wife, which contract was assigned to the said Walter F. Johnson, shall be decreed to be a valuable contract for the sale of the entire eighty (80) feet and the said defendant, Walter F. Johnson, shall be entitled to a conveyance of the said eighty (80) feet according

to the terms of said contract and paying the amounts herein decreed to be paid.

Kleber P. Rockwell,
Circuit Judge.

Countersigned:

Floyd B. Babcock,
County Clerk.

(1) Authorities Cited by Defendants Johnson, Brief for Defendant.—

1. The defendants Johnson contend that plaintiffs have an adequate remedy at law.

Where a contract has passed into the hands of a bona fide purchaser for value, it cannot be reformed or corrected by a court of equity; *Dort v. Barbour*, 32 Mich. 267; *Toll v. Davenport*, 74 Mich. 386; *Culbertson v. Whitbeck Co.*, 92 Mich. 469; *Robertson v. Smith*, 191 Mich. 660; 34 Cyc. 956-957.

2. He who comes into equity must come with clean hands.

The court found that plaintiff was aware of the mistake in the contract. In 33 Cyc. 948, the rule is settled as follows:

"Against the party seeking reformation, broadly speaking, it is a good defense to set up and prove that the mistake charged was due to the complaining parties' own negligence. *Troops v. Snyder*, 70 Ind. 554; *Wood v. Patterson*, 4 Md. Ch. 335; *Taylor v. Fleet*, 4 Barb. 95.

"The mistakes which equity will correct are not those which might have been avoided by common and ordinary care, which are the results of negligence." *Young v. McGown*, 68 Me. 61; *Graham v. Berryman*, 19 N. J. Eq. 35.

3. Cannot vary written contract by parol evidence.

It was sought in this case to show by parol evidence that the contract should have read 40 feet instead of 80 feet.

Where mutual mistake is proven, parol evidence is admissible, but here the mistake proven is one between the scrivener, and the plaintiff Johnson was not a party to the mistake. The mistake lacked the element of mutuality. Therefore, the rule and not the exception applies here.

It is needless to cite cases in support of this rule.

4. Plaintiffs estopped from securing relief from defendant Johnson.

Plaintiff stood by and permitted the contract to be assigned by Johnson to Rogerson, knowing of the mistake, without saying a word for three months.

All the elements of estoppel are present herein, (a) the knowledge; (b), the silence, while the rights of innocent parties are being affected; (c) the plain duty to speak; (d) the failure to do so. *Pearson v. Hardin*, 95 Mich. 360; *Mich. Paneling Co. v. Pearsell*, 38 Mich. 475.

5. Laches.

Plaintiffs became aware of the mistake in the land contract at the time they sold to Klees in October, 1916, and made no objection to the

assignment by Klees to Johnson in November, 1917, and took no legal steps to rectify this error until August, 1918.

In *Grymes v. Sanders*, 93 U. S. 55, the court said :

"The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

"Mistake, to be available, in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person.'" *Kerr on Fraud and Mistake*, 407; *Watts v. Spokane Ry. Co.*, 171 Pac. 901.

(j) Authorities Cited by Plaintiff—Brief for Plaintiff.—All parties know that only 40 feet were to be conveyed and the following applies:

"To justify the reformation of a written contract upon the ground of mistake in drafting it, the alleged mistake must be proven by clear and satisfactory evidence and must be mutual, common to both parties to the contract." *Kinyon v. Cunningham*, 146 Mich. 430; *Drake v. Boylon*, 160 Mich. 522; *Dillie v. Longwell*, 163 Mich. 439.

The right of an individual to have an instrument reformed when a mistake has been clearly shown, cannot be questioned in this state. *Dwight v. Thler*, 49 Mich. 614; *Probett v. Walters*, 70 Mich. 437; *West v. Mohoney*, 86 Mich. 121.

LABRANCHE v. PERRON, 209 Mich. 239—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Exhibit "A" of Plaintiff.
- (d) Amendments to Bill of Complaint.
- (e) Answer and Cross-Bill.
- (f) Answer of Plaintiff to Cross-Bill.
- (g) Decree.
- (h) Authorities Cited by Defendant. Brief for Defendant.
- (i) Authorities Cited by Plaintiff. Brief for Plaintiff.

LABRANCHE v. PERRON, 209 Mich. 239—

(a) Brief Statement of Fact.—A bill of complaint was filed to reform a land contract executed to secure to the vendees an undivided one-half interest for money advanced to plaintiff to make the purchase, the vendees having subsequently sold to defendants the entire property. From a decree correcting the instrument to make it express the actual agreement, the defendant appealed, which decree was affirmed.

(b) Bill of Complaint.—

STATE OF MICHIGAN

In the Circuit Court for the County of Menominee
In Chancery

Louis LaBranche,
Plaintiff,)
v.)
Menazip Perron,
Defendant.)

To the Circuit Court for the County of Menominee
In Chancery

Louis LaBranche, plaintiff herein, brings this, his bill of complaint, against Menazip Perron, defendant herein, and thereupon respectfully shows unto this court:

1. That on, to-wit, the 25th day of November, A. D. 1913, one John Gasman was the owner in fee simple of the following described lands situated and being in the County of Menominee and State of Michigan, namely:

The northeast quarter and the west half of the southeast quarter, all in section twenty-six, the northwest quarter of the northeast quarter, the south half of the northeast quarter, the south half of the northwest quarter, all in section thirty-six, the northwest quarter of the southeast quarter and the southeast quarter of the southwest quarter all in section twenty-two all in township forty north, range twenty-six west, containing five hundred and twenty acres, more or less, according to the government survey thereof, excepting and reserving all mineral rights, to enter and remove same without cost to the said Louis LaBranche.

2. That the plaintiff, at such time and for many years prior thereto and ever since, has been in the business of taking out forest products, and in order to provide himself with land and timber for such operations, made and entered into a contract with said John Gasman whereby the plaintiff agreed to buy and the said John Gasman agreed to sell to the plaintiff, the aforesaid lands and timber thereon, at a consideration of fourteen thousand five hundred dollars.

3. That the plaintiff at such time did not have sufficient moneys with which to make the first payment required to be made on said contract and thereupon applied to one Celestine Boissonneault and one Elginas Boissonneault for them to advance the sum of money required for the said first payment, namely, the sum of seven thousand dollars.

4. That the said Celestine Boissonneault and Elginas Boissonneault thereupon advanced the sum of seven thousand dollars, and it was understood by and between the plaintiff and the said Celestine and Elginas Boissonneault, that the plaintiff would go on with logging operations on said lands and that the net proceeds from said operations would be divided between the parties, namely, after the payment of the expenses of taking out said timber, the plaintiff would be entitled to one-half of

the moneys remaining and the said Celestine and Elginas Boissonneault would be entitled to the other half of said moneys; and the plaintiff would retain an undivided half interest in said lands and the said Celestine and Elginas Boissonneault would be entitled to the other undivided one-half thereof.

5. That in order that the said Celestine and Elginas Boissonneault would have proper written evidence showing such payment to have been made by them and in order that they might be properly secured for the moneys so advanced by them, the aforesaid contract given by the said John Gasman to the plaintiff was assigned and set over to the said Celestine and Elginas Boissonneault by manner of making a duplicate of said contract, except that in said duplicate, the plaintiff was named as the first party and the said Celestine and Elginas Boissonneault were named as second parties, which said duplicate was duly executed by the parties thereto, and is made a part hereof as plaintiff's Exhibit "A."

6. That for a number of years the plaintiff continued operations on said land in pursuance of aforesaid verbal agreement and in accordance therewith made division of the proceeds as agreed between the parties.

7. That said lands are valuable for farming purposes and there is still remaining thereon valuable forest products to be taken out, and that the plaintiff always has been and still is desirous of carrying out his part of the agreement.

8. That the contract referred to as having been executed by the plaintiff to Celestine and Elginas Boissonneault was recorded in the office of the register of deeds of Menominee County, Michigan, on the twenty-fourth day of December, 1917, in Liber "F" of miscellaneous records, on pages 421 and 422 thereof.

9. That recently, to-wit, on the 26th day of August, A. D. 1918, the said Celestine and Elginas Boissonneault transferred and conveyed by quit-claim deed to the defendant Menazip Perron all their right, title and interest in and to the land and premises described in said land contract, which deed was recorded in the office of the Register of Deeds of Menominee County, Michigan, in Liber 95 of deeds on page 531 thereof on the 27th day of August, A. D. 1918.

10. That the said defendant, Menazip Perron well knew that the said contract was executed by the plaintiff to Celestine and Elginas Boissonneault only as security for the sum of moneys advanced by said Celestine and Elginas Boissonneault, and that the said defendant, Menazip Perron well knew of the aforesaid agreement between the plaintiff and the said Celestine and Elginas Boissonneault relative to the logging of said lands.

11. That the said Menazip Perron has now gone into possession of said lands and has begun and threatens to cut and remove all the remaining timber thereon, claiming to be the sole owner thereof, and that the plaintiff's only interest in said land and timber is that he may

be entitled to receive the balance owing on said contract according to the import thereof, and that the plaintiff fears and has good reason to believe that the said Menazip Perron will execute the said threats unless restrained by the order of this court.

12. That the timber remaining on said land is of much greater value than the amount required to now pay the balance due and owing on the aforesaid contract according to the import thereof, namely such difference in value now amounts to more than the sum of five thousand dollars, and the plaintiff is justly apprehensive of the loss thereof unless the said Menazip Perron be restrained by the order of this court from continuing to commit said waste on said land and premises.

13. That because of the character of the timber (being hardwood products) present war and condition of labor market, the cost of supplies and equipment, the present season is not an opportune time for the cutting and removing of said timber and the plaintiff is justly apprehensive that because of the speculative and uncertain outlook and the present embargo on lumber products that he will suffer an irreparable loss if the said Menazip Perron continues to cut and remove the said timber.

Wherefore the plaintiff being without remedy in the premises, except in a court of equity, prays:

(a) That the said defendants may each be required to make true answers to each and every allegation herein contained but not under oath (the answer under oath being hereby waived).

(b) That the said Menazip Perron upon the filing of this bill of complaint be restrained by the order of this court during the pendency of this suit, from cutting or logging upon or removing any of the timber from said lands and that likewise his agents, attorneys, representatives or assigns be also so restrained, and that upon the final hearing of this cause each of them be perpetually restrained.

(c) That the aforesaid contract made and executed by the plaintiff to Celestine and Elginas Boissonneault be reformed so as to express the true intent of the parties.

(d) That there may be a division and partition of the said land and premises by and between the parties to this action according to their respective interests in said lands and timber.

(e) That the plaintiff may have such other or such further relief in the premises as equity may require and as to this court may seem best.

Louis LaBranche,
Plaintiff.

John H. O'Hara,

Attorney for plaintiff,

Business address: Menominee, Mich.

State of Michigan, }
County of Menominee. } ss.

Louis LaBranche, being first duly sworn, deposes and says that he has read the foregoing bill of complaint signed by him and knows the

contents thereof and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to these matters he believes it to be true.

Subscribed and sworn to before me this 10th day of December, A. D. 1918.

J. Chas. Guay.

Notary Public,

Menominee County Michigan.

My commission Expires May 18, 1921.

(c) Exhibit "A."—Of Plaintiff.—This contract, made this twenty-sixth day of November, in the year one thousand nine hundred and thirteen, between Louis LaBranche, of the Township of Spaulding, County of Menominee, State of Michigan, party of the first part, and Celestine and Elginas Boissonneault, of the same township, same county and same state, parties of the second part,

Witnesseth, that the said party of the first part, in consideration of the sum of fourteen thousand and five hundred dollars, to be duly paid as hereinafter specified, hereby agrees to sell and convey to the said parties of the second part, all of the following described land, situated in the township of Spaulding, County of Menominee, State of Michigan,

The northeast quarter ($NE\frac{1}{4}$) and the west half of the southeast quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$) all in section twenty-six (26), the northwest quarter of the northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$), the south half of the northwest quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) all in section thirty-six (36), the northwest quarter of the southeast quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) and the southeast quarter of the southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$), all in section twenty-two (22) all in township forty (40) north of range twenty-six (26) west, containing five hundred and twenty (520) acres more or less according to the government survey thereof, excepting and reserving all mineral rights, to enter and remove same without cost to said Louis LaBranche, for the sum of fourteen thousand five hundred (\$14,500.00) dollars which said parties of the second part agree to pay to the said party of the first part as follows: Seven thousand (\$7,000.00) dollars on the execution and delivery of this contract, and the receipt whereof is hereby acknowledged, and thirty-seven hundred and fifty dollars (\$3700.50) one year from the date hereof, and thirty-seven hundred and fifty dollars (\$3700.50) two years from the date hereof with interest on all sums at any time unpaid, at the rate of seven per cent. per annum, interest payable annually.

Said parties of the second part also agree to pay in due season all taxes, and assessments, extraordinary, that shall be taxed or assessed on said land including the taxes thereon for the year 1913.

It is further mutually agreed, by the parties hereon, that the party of the first part, on receiving payment in full of the said principal and interest at the times and in the manner above mentioned, and of all other sums chargeable in his favor hereon, shall and will at his own proper cost and expense, execute and deliver to the said parties of the second part a good and sufficient warranty deed of said above described

lands, free and clear of and from all liens and encumbrances, except such as may have accrued on said lands subsequent to the date hereof, by or through the acts or negligence of said parties of the second part.

It is further mutually agreed, by said parties that the said Louis LaBranche, party of the first part, shall, and hereby does have a lien upon all timber which shall at any time be cut, manufactured or removed from said land or premises and that the said lien shall follow and continue upon said timber at all times and places to which the same may be removed and shall form and be a part of his securities under this contract and the deed of said land which is held by and in the name of said Louis LaBranche.

It is further mutually agreed, by said parties that if all of the timber, or the greater part thereof shall be cut and removed from said land and premises before the amount secured hereby is fully paid that the said Louis LaBranche shall be fully paid out of and from the proceeds of the sale of said timber and that after the said party of the first part shall receive payment in full under this contract his liens upon said land and upon said timber shall cease and be null and void and that he shall execute and deliver to the said Boissonneault Brothers a warranty deed, as aforesaid.

This contract and deed held by the said Louis LaBranche, is held by him as collateral security to two promissory notes of thirty-seven hundred and fifty dollars (\$3750.00) each executed by the said Boissonneault Brothers and bearing even date hereof.

It is also agreed, by the parties hereto that if the said parties of the second part shall fail to perform this contract or any part of the same, the said party of the first part shall, immediately after such failure, have the right to declare this contract void, and to retain whatever may have been paid hereon, and all improvements that may have been made on said land, as stipulated damages for nonperformance of this contract, and may consider and treat said parties of the second part as his tenants holding over without permission, and may take immediate possession of said land, and remove said parties of the second part therefrom.

And it is agreed, that the stipulations herein contained are to apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above mentioned.

Signed, sealed and delivered in presence of Eugene Ethier, Louis Belanger.

Louis LaBranche, (Seal)

Celestine Boissonneault, (Seal)

Elginas Boissonneault. (Seal)

State of Michigan, }
County of Menominee, } ss.

On this twenty-sixth day of November in the year nineteen hundred and thirteen, before me, the subscriber, a justice of the peace in and for said county, personally came Louis LaBranche, Celestine Boissonneault and Elginas Boissonneault, to me known to be the persons named in and who executed the within instrument as vendors, and each acknowledged that he executed the same as his free act and deed for the purposes therein mentioned.

Louis Belanger,

Justice of the Peace.

(d) Amendments to Bill of Complaint.—(Caption.) Now comes the above named plaintiff and for amendments to his bill of complaint to meet the proofs presented at the hearing of said cause, and to present to the court matters arising subsequent to the filing of said bill, further alleges:

First. As an additional sentence to paragraph numbered four of the bill of complaint heretofore filed in said cause, the following:

That the plaintiff and the said Celestine and Elginas Boissonneault were partners with the plaintiff and fiduciary relations existed between the parties in all things pertaining to the carrying on of said joint enterprise relative to said lands.

Second. For and as an additional allegation to paragraph numbered five of the said bill of complaint heretofore filed in said cause, the following:

That it was mutually intended and understood by and between the parties that said Exhibit "A" merely stand as evidence of the fact that the said Celestine and Elginas Boissonneault had paid seven thousand dollars as and for their share of the purchase price of said lands and further so that the said Celestine and Elginas Boissonneault would have a writing that they might refer to in order to thereafter know and be kept informed as to the details of the land contract heretofore executed by John Gasman to the plaintiff. That said Exhibit "A" was executed by the plaintiff and delivered to the said Celestine and Elginas Boissonneault because and in reliance upon the fiduciary relations existing by and between the plaintiff and the said Boissonneaults concerning said joint and partnership enterprise, and it was at all times mutually reserved and understood that the plaintiff had an undivided half interest in the purchase of said lands for which said half interest the plaintiff was to pay the remaining payments to be made as evidenced by the said contract executed by John Gasman to the plaintiff. That it was mutually intended by the execution of said Exhibit "A" that the Boissonneaults have a lien upon all of said land for moneys advanced by them to the end that when such partnership logging operations cease between the parties the said Boissonneaults, for the said moneys paid by them, be given the proper indenture showing them to be owners of one-half of said lands, and to the end that the said Boissonneaults have

a lien on the whole contract for the purchase of said lands until the plaintiff paid John Gasman the remaining sum due him thereon. That it was never intended that the said Celestine and Elginas Boissonneault were contract purchasers of anything more than an undivided one-half of said lands.

Thir'd. For and to stand in lieu and place of paragraph numbered ten of the said bill of complaint heretofore filed in said cause, the following:

That the said defendant, Menazip Perron, at all times well knew of the relationship and rights existing between the plaintiff and said Celestine and Elginas Boissonneault concerning said lands said contract of the plaintiff to the Boissonneaults.

Fourth. For an additional paragraph to said bill of complaint and to present matters arising subsequent to the filing of said bill of complaint, the following:

(a) That the plaintiff has paid to said John Gasman all the purchase price of said lands pursuant to said contract and has received from the said John Gasman and his wife, as grantors, to the plaintiff as grantee, a warranty deed, conveying said lands to the plaintiff, which deed is dated....., is duly witnessed and acknowledged and entitled to record in the office of the Register of Deeds, which deed the plaintiff is ready to produce as the court may direct.

(b) That subsequent to the 26th day of August, 1918, the defendant Menazip Perron has gone into possession of said lands and has cut and removed a large quantity of timber therefrom, has logged upon and cut timber thereon during all the winter of 1919 and is still engaged in cutting and removing timber therefrom, and declines and refuses to account to the plaintiff for any share thereof.

(c) That plaintiff has applied to the said Menazip Perron for a division and partition of said lands and the said Menazip Perron declines and refuses to come to any agreement in reference thereto.

Wherefore, the plaintiff, being without remedy in the premises except in a court of equity, further prays:

1. That the defendant Menazip Perron be required to true answer make to the additional matters hereinbefore set forth, but not under oath (the answer under oath being hereby waived).

2. That the contract executed by the plaintiff to Celestine and Elginas Boissonneault be cancelled and held for naught.

3. That a partition and division of said lands between the plaintiff and the defendant be decreed and that reference be made to a circuit court commissioner to inquire into the situation of the premises, and to report whether such premises, or any part of them, are so circumstanced that a partition and division thereof amongst the owners can be made by meets and bounds, and to take testimony concerning the timber taken from said lands to the end that a just and equitable division be made.

John J. O'Hara,

Attorney for plaintiff.

George Barstow,

Of counsel.

(e) Answer and Cross-Bill.—(Caption.) The answer of Menazip Perron, the above named defendant, to the bill of complaint hereinbefore filed in said cause against this defendant, respectfully shows unto the court as follows:

1. That defendant admits the allegations contained in paragraph one of the bill of complaint.

2. Answering paragraph two of the bill of complaint, this defendant admits that the plaintiff entered into the contract with John Gasman therein set forth and for the consideration therein named, but this defendant has no knowledge of the business reasons which prompted the plaintiff to enter into the said contract.

3. Answering paragraph three of the bill of complaint, this defendant has no knowledge of the matters therein set forth and alleged, sufficient to form a belief, and therefore leaves the plaintiff to his proofs as to those matters.

4. Answering paragraph four of the bill of complaint, this defendant has no knowledge of the matters therein contained sufficient to form a belief, and therefore leaves the plaintiff to his proofs as to those matters.

5. Answering paragraph five of the bill of complaint, this defendant admits that the plaintiff made and executed the land contract set forth in his Exhibit "A," but denies that he has any knowledge that in the making of said contract any other legal effect was intended by the parties to the said contract than that expressed in the writing; and this defendant, further answering paragraph five of the bill of complaint, denies that the plaintiff may, as against this defendant, claim that the legal effect of the said land contract was or is other than shown by the words of said contract.

6. Answering paragraph six of the bill of complaint, this defendant has no knowledge of the allegations therein contained sufficient to enable him to form a belief, and therefore leaves the plaintiff to his proofs, but denies that proof of the matters therein contained will have any tendency to entitle him to the relief prayed in his bill of complaint or to any other relief.

7. Answering paragraph seven of the bill of complaint, defendant admits that the lands in controversy are valuable for farming purposes and for forest products, but as to the desire of the plaintiff to carry out his part of any agreement other than expressed in his written contract, this defendant has no knowledge and denies the validity of any other agreement.

8. Defendant admits the allegations contained in paragraph eight of the bill of complaint.

9. Answering paragraph nine of the bill of complaint, defendant admits that he purchased all of the right, title and interest of said Celestine Boissonneault and Elginas Boissonneault in and to the lands

described in the bill of complaint, and further says that he paid them approximately nine thousand dollars for their said interest.

10. Answering paragraph ten of the bill of complaint, this defendant denies that he has any knowledge of any understanding, arrangement or agreement between the plaintiff and the said Celestine and Elginas Boissonneault which was in any wise at variance with or in contradiction of the terms expressed in the written contract between the plaintiff and the said Celestine and Elginas Boissonneault, as set forth in plaintiff's Exhibit "A." Further answering paragraph ten of the bill of complaint, this defendant says that he purchased the interest of Celestine and Elginas Boissonneault in good faith, relying upon the said contract for the purchase of the said lands as set forth in plaintiff's Exhibit "A" as representing the true relation between the plaintiff and the said Celestine and Elginas Boissonneault with reference to said lands; further answering paragraph ten of the bill of complaint, this defendant says that his negotiations with the said Celestine and Elginas Boissonneault for the purchase of their interest in said lands extended over a period of several weeks, and that the plaintiff was fully cognizant of said negotiations; that the said plaintiff, knowing of the said negotiations, made no objection thereto to this defendant, neither did the plaintiff tell this defendant that he had any other interest in said premises than that set forth in the contract between himself and the said John Gasman, and the other contract set forth in plaintiff's Exhibit "A." Further answering paragraph ten of the bill of complaint, defendant says that after purchasing the interest of the said Celestine and Elginas Boissonneault, and paying them approximately nine thousand dollars therefor, this defendant went to the plaintiff and requested him to make a statement of the amount due him under the contract for the purchase of said lands and advised the plaintiff that he was ready and willing to pay him any amount legally his due thereunder; that at that time the plaintiff made no claim against him or that he had any enforceable interest in said lands except as shown by his said contracts. That this defendant, with full knowledge of the plaintiff, thereupon commenced logging operations on said lands and to that end incurred large expense in building camps, cutting roads and getting out timber and forest products; that the defendant sold and furnished defendant with lumber with which to build his camps upon said lands, well knowing that the lumber so sold was designed for the construction of such camps; that between the time of making the purchase of the said Celestine and Elginas Boissonneault in and to said lands, this defendant has expended, in addition to the purchase price aforesaid, the sum of approximately sixteen thousand dollars; that such sum was expended with the full knowledge of the plaintiff and without any claim or objection on his part; that this defendant has now fifty men employed in taking out forest products upon said lands and that should he be compelled at this time to suspend his said logging operations he would sustain great and irreparable loss in the premises; that the plaintiff is financially

irresponsible and the damages that would be sustained by this defendant, in the event of a suspension of his said logging operations, could not be recovered by the defendant. Further answering paragraph ten of the bill of complaint, this defendant shows that the legal title to said lands is in John Gasman; that he now is and always has been ready and willing to pay the plaintiff all moneys that may be due him under the said contract as set forth in his Exhibit "A" upon the tender to this defendant by the plaintiff of a good title to said lands; that the plaintiff has not paid the full purchase price of said lands, although payment under his contract with the said John Gasman is long past due. By reason of the laches herein set forth this defendant says that the plaintiff is estopped to claim any of the relief prayed for in the bill of complaint.

11. Answering paragraph eleven of the bill of complaint, defendant admits that he has now gone into possession of said lands and is removing the timber therefrom, but insists that he is in the exercise of his legal and equitable rights in so doing.

12. Answering paragraph twelve of the bill of complaint, defendant says that the allegations therein are mere speculative opinion, and neither admits nor denies such allegations, but insists that they are not material to the question herein involved.

Wherefore the defendant prays that the relief hereinbefore prayed by defendant in his cross-bill herewith filed be granted.

N. C. Spencer,
Attorneys for defendant.

Cross-Bill.—Defendant respectfully shows unto the court:

1. That when he purchased the interest of Celestine and Elginas Boissonneault in and to the lands described in the bill of complaint by means of the quit-claim deed therein described, the legal title to said lands was in John Gasman, as alleged in the foregoing answer; that such legal title is still in the said John Gasman, and the plaintiff is not now in position to make a good conveyance to this defendant under the terms of his contract with the said Boissonneaults until he has perfected his title by performing his said contract for the purchase of the said lands with the said John Gasman; that this defendant does not know the amount, if any, which the said plaintiff has paid upon his said contract with the said John Gasman; that this defendant is ready and willing and now offers to pay any amount that may be shown to be due the said plaintiff under his said contract with the said Boissonneaults, but up to this time he has been unable to get a statement from the plaintiff as to how much there is now due him thereunder, nor how much the plaintiff is indebted to the said John Gasman under his contract with him; that in order that all the equities between the parties may be adjusted and each receive what is his just due under the several contracts, it is necessary that the said John Gasman be made a party to this cause.

2. Defendant further shows that he is informed and believes that the said Celestine and Elginas Boissonneault are entitled to certain credits which should be applied upon their said contract with the plaintiff, but that this defendant does not know the exact amount of such credits; that such credits are contained in the books of the plaintiff and that such books are the only record of such credits; that the plaintiff has never accounted to the said Celestine and Elginas Boissonneault for such credits and that this plaintiff is informed and believes that the said Celestine and Elginas Boissonneault are ignorant of the amount of credits to which they are entitled, and that the only way in which this defendant may be informed of the amount of such credits is by means of a discovery to be made by the plaintiff upon the matter of such credits.

By reason of the matters and things herein set forth the defendant prays:

(a) That the plaintiff be required to answer this cross-bill.

(b) That the said John Gasman be made a party to this suit and that a subpoena may be issued out of and under the seal of this court requiring the said John Gasman to enter his appearance herein.

(c) That the plaintiff may be required by the decree of this court to make conveyance of the said lands to this defendant in accordance with the terms of his said contract with the said Celestine and Elginas Boissonneault, and that in default thereof this defendant may be subrogated to the rights of the said plaintiff under his contract with the said John Gasman, and upon payment of all amounts due the said John Gasman under his said contract with the plaintiff and to the plaintiff under his contract with the Boissonneaults, he may be entitled to receive a deed to the said lands from the said John Gasman, freed from any and all claim of the plaintiff therein.

(d) That the plaintiff may be required to produce all books of account in his possession or under his control containing accounts between himself and Celestine and Elginas Boissonneault during the continuance of his said contract with them, for the inspection and examination of this defendant.

(e) That this defendant may have such other and further relief in the premises as to equity and good conscience as shall seem meet.

N. C. Spencer,

Attorney for defendant.

Business address:

Escanaba, Mich.

Dated December 29, 1918.

(f) Answer to Cross-Bill.—(Caption.) The above named plaintiff, answering the cross-bill filed herein, respectfully shows unto the court:

1. The plaintiff admits the legal title to the lands was at the time of the purchase of the same, by Menazip Perron, from Celestine and Elginas Boissonneault, and is now in John Gasman, that the said Menazip knew at the time he purchased the interest of the said Celestine and

Elginas Boissonneault that the plaintiff herein had an undivided one-half interest in and to the property described in the bill of complaint herein.

Further answering paragraph one of the cross-bill, the plaintiff informs the court that he has paid on the principal of the contract with John Gasman the sum of three thousand seven hundred and fifty dollars and interest at seven per cent. per annum on seven thousand five hundred dollars from November 26, 1913, to November 26, 1918, approximating the sum of two thousand six hundred and twenty-five dollars, that he has further paid as his share of the taxes the sum of four hundred and eighty-eight dollars, that the above sums, together with a balance of three thousand seven hundred and fifty dollars, and accrued interest totaling an approximate sum of nine thousand five hundred dollars paid, and to be paid by the plaintiff upon the said land contract.

2. Answering paragraph two, plaintiff respectfully shows:

That there are no sums due to the said Celestine and Elginas Boissonneault from this plaintiff, excepting such sum as may be received from the bankrupt estate of the John Gillespie Lumber Company of Chicago, from which this plaintiff believes the said Boissonneaults may realize the sum of four hundred dollars.

The plaintiff further answering paragraph of the cross-bill, says that the said Celestine and Elginas Boissonneault at the time of the purchase of said lands did not pay their one-half interest in full and that they are indebted to the plaintiff in the sum of two hundred and fifty dollars and the interest on said sum from the date of said contract exhibited herein as part of the plaintiff's bill of complaint.

The plaintiff denies that the defendant is entitled to any relief against him by reason of anything in said cross-bill contained, and prays that the same may be dismissed with his costs in this behalf sustained.

Dated January 14, 1919.

John J. O'Hara,
Attorney for plaintiff.
Business address:
Menominee, Mich.

(g) Decree.—(Caption.) At a session of said court held at the court house in the City of Menominee on the 7th day of August, 1919.

Present: Hon. Richard C. Flannigan, Circuit Judge.

Appearances: John J. O'Hara, attorney for plaintiff; N. C. Spencer, attorney for defendant.

This cause having come on to be heard in open court upon the bill of complaint, the amendments thereto, and the answer and cross-bill of the defendants, and the court having heard the arguments of counsel of the respective parties, does find that the material allegations of said bill of complaint as amended have been sustained by clear and convincing proof; and it appearing to the court that the land contract heretofore on the 26th day of November, 1913, executed by the plaintiff to Celestine and Elginas Boissonneault, as described in said bill of complaint, was intended as security that the said plaintiff would pay to John

Gasman the remaining portion of the purchase price of said lands, and that the plaintiff would convey an undivided one-half of said lands to said Celestine and Elgines Boissonneault; it further appearing to the court that the plaintiff has paid to the said John Gasman the remaining portion of the purchase price of said lands, and that the said lands have been by the said John Gasman duly conveyed to the plaintiff, and it also appearing that the defendant Menazip Perron is purchaser and owner of all the right, title and interest at any time had or possessed by said Celestine and Elginas Boissonneault in and to said lands thereupon.

On motion of John J. O'Hara, attorney for plaintiff, it is ordered, adjudged and decreed that the plaintiff and the defendant Menazip Perron, are tenants in common of the lands and premises described in said bill of complaint, and said contract, and that said tenancy in common is an undivided one-half interest in the plaintiff and an undivided one-half interest in the defendant, Menazip Perron, and dates from and after the 26th day of August, A. D. 1918, the date upon which Celestine Boissonneault and Elginas Boissonneault conveyed their one-half interest in said lands by quit-claim deed to said Menazip Perron; and it further ordered, adjudged and decreed that the plaintiff do convey an undivided one-half of said lands to the said defendant Menazip Perron which said conveyance, however, shall be without prejudice to the right of the plaintiff to recover for one-half the value of any timber heretofore cut or taken from said lands by the said defendant; and it is ordered that in default of such conveyance on the part of the plaintiff to the said defendant; then that this decree shall be held to operate as such conveyance and leave is granted to record this decree in the office of the Register of Deeds of Menominee County, where said lands are situated.

And the attorneys for the respective parties stipulating in open court that the recent acts and doings of the defendant, Menazip Perron, in relation to the lands described in said bill of complaint are such that a partition and accounting could be more advantageously had and more equitably adjusted between the parties, by the plaintiff, if he elect so to do, filing and commencing a new suit setting forth such new matters and recent happenings, all occurring subsequent to the present suit, and the plaintiff being content to have partition of the said lands deferred to and left for determination in a subsequent suit to be commenced thereupon the plaintiff's prayer for partition in the present suit is denied without prejudice.

And it is further ordered, adjudged and decreed that the defendant, Menazip Perron, pay to the plaintiff or his attorney, the costs in this suit to be taxed, and that the plaintiff have execution for the same.

Richard C. Flannigan,
Circuit Judge.

Examined, countersigned and entered by me:
Carl A. Anderson,
Clerk of court.

(h) Authorities Cited by Plaintiff. Brief for Plaintiff.—1. Parol evidence is not admissible to vary or contradict terms of a written instrument, *Adair v. Adair*, 5 Mich. 203, and mistake as to the legal effect of an instrument constitutes no ground for relief. *Martin v. Hamlin*, 18 Mich. 353; *White v. Smith*, 37 Mich. 290, where parties, in unambiguous language, declare in a written instrument itself, the purpose of an agreement, and neither fraud nor mistake is claimed in the pleadings, it cannot be varied by parol. *Baker v. Baird*, 79 Mich. 255; *Price v. Martin*, 122 Mich. 655; *Crane v. Bayley*, 126 Mich. 323.

Evidence is not admissible which, conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify or change the character of the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing. *Smith v. Mathis*, 114 Mich. 262; *Ogooshevitz v. Arnold*, 197 Mich. 203.

In the last cited case the trial court found that the actual contract between the parties was not embodied in the written instrument. This court said:

"The contract being complete in itself, unambiguous, certain in its terms, no fraud or mistake being alleged in the pleadings, it was error to receive evidence contradicting its provisions, or tending to show that it did not embody the agreements of the parties."

2. Mortgage: A mortgage is a conveyance of an estate by way of pledge for the security of a debt and becomes void upon payment of it. *Goddard v. Coe*, 55 Me. 385; *Babcock v. Hoey*, 11 La. 375.

A mortgage is a conveyance of lands by a debtor to his creditor as a pledge or security for the repayment of money due, with the proviso that such conveyance shall become void on payment of the money with interest on a certain day. *Hall v. Byrne*, 2 Ill. 140.

A mortgage is in effect a sale with a power of defeasance, which may ultimately end in an absolute transfer of title. *Woolen Mfg. Co. v. Bank*, 119 U. S. 191.

A mortgage conveys an estate or title defeasable on condition. If the condition is performed according to its terms, the mortgage immediately becomes void and the mortgagee is divested of his title. *Weeks v. Baker*, 152 Mass. 20.

The terms "security" and "mortgage" are not co-extensive.

The term "security," as used by a vendee in describing a bill of sale from the vendor, which purported to be an absolute transfer, is not sufficient to fix the character of such instrument as a mortgage. *Prentice v. Schirmer*, 136 N. Y. 305.

In a land contract the vendee gets an equitable title, but the legal title still remains in the vendor, and is held as "security" for the purchase price. *Hooper v. Van Hausen*, 105 Mich. 597.

(i) Authorities Cited by Plaintiff. Brief for Plaintiff.

1. The contract in question was merely a mortgage.

An absolute deed or bill of sale may be shown to have been intended as a mortgage. *Hurst v. Beaver*, 50 Mich. 613; *McMillan v. Bissell*, 63 Mich. 66; *Flynn v. Holmes*, 145 Mich. 606; *Pinch v. Willard*, 108 Mich. 204; *Perry v. Miller*, 164 Mich. 429. And the rule also applies to an assignment of an executory land contract. *Gamble v. Ross*, 88 Mich. 315; *Gunderman v. Gunnison*, 39 Mich. 313; *Jackiewicz v. Siwka*, 187 Mich. 165.

Parol evidence is admissible to show that a deed was intended as a mortgage. *Mintz v. Soule*, 182 Mich. 564; *Emmerson v. Atwater*, 7 Mich. 12; *McMillan v. Bissell*, 63 Mich. 66; *Smith v. Smith*, 174 Mich. 269.

It is a well established rule that the actual consideration for deeds may be shown. *Ruch v. Ruch*, 159 Mich. 231 (234); *Olney v. Brown*, 163 Mich. 125.

The fact that the instrument is only given as security may be shown in equity even though there is no fraud or mistake. *Flynn v. Holmes*, 145 Mich. 611.

2. Statute of Frauds: The case at bar is, in some respects similar to the recent case of *Edwards v. Zuch*, reported in 171 Mich. 29, and involving a joint logging enterprise, wherein the court said:

"It is suggested that, as this co-partnership agreement was oral and dealt with the sale of lands, it is therefore, void as being within the statute of frauds, under the rule laid down in *Nester v. Sullivan*, 147 Mich. 493 (111 N. W. 85, 1033; 9 L. R. A. (N. S.), 1106). The holding of the trial court in this case is not an infringement of the rule laid down in that case, for the reason that the complainant is the owner of the title and the person for whose protection the statute exists, and he insists that defendant has paid for and is entitled to, an undivided one-half interest in the 40 acres. Such a case is not within the statute of frauds. *Spalding v. Archibald*, 52 Mich. 365 (17 N. W., 940; 50 Am. Rep. 253)." *Id.*, page 32.

3. Mortgage: The word "security" is to be given such meaning as the witnesses intended in the light of all the facts and circumstances.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and contents according to the circumstance and in the time in which it is used." *Tourne v. Eisner*, 245 U. S. 418.

CHAPTER XIII

ACTIONS FOR FRAUDULENT MISREPRESENTATIONS PLEADINGS, EVIDENCE, MISCELLANEOUS, BILLS OF COMPLAINT, PLEADINGS AND BRIEFS USED IN LATE MICHIGAN CASES

I. FALSE REPRESENTATIONS

- § 204. General Principles.
- § 205. Materiality of Representations.
- § 206. Representations as to Matter of Law.
- § 207. Expressions of Opinion.
- § 208. Promises as to Improvements or Use of Real Property.
- § 209. Representations as to Title, Interest.
- § 210. Concealment of Encumbrance.
- § 211. Representations as to Quantity, Boundaries or Location.
- § 212. Representations as to Value.
- § 213. Representations as to Quality, Condition and Improvement.

II. REMEDIES FOR FRAUDULENT MISREPRESENTATIONS

(a) OF THE PURCHASER.

- § 214. Jurisdiction of Equity.
- § 215. Actions at Law.
- § 216. Time to Rescind.
- § 217. Waiver of Right to Rescind by Acts of Assertions of Ownership.
- § 218. Restoration of Status Quo.
- § 219. Damages.

(b) OF THE VENDOR.

- § 220. In General.
- § 221. As to Area.
- § 222. As to Title.
- § 223. As to Value of Land.
- § 224. As to Thing of Value Given for Land.
- § 225. Non-Disclosure and Concealment.

III. PLEADING AND PRACTICE

(a) EQUITY.

- § 226. Requisites of Bill of Complaint.
- § 227. Allegations of Fraud and False Representations.
- § 228. Describing Instrument.
- § 229. Showing Promptness and Diligence.
- § 230. Offer to Restore or Do Equity.
- § 231. Answer or Counterclaim.
- § 232. Form of Bill of Complaint.

(b) ACTIONS AT LAW.

- § 233. Requisites of Declaration.

§ 234. Form.

§ 235. Declaration.

§ 236. (c) Pleadings and Briefs Used in Late Michigan Cases, Involving Actions for Fraudulent Misrepresentations, Both in Equity and in Law.

§ 204. Actions for Fraudulent Misrepresentations—I. False Representations—1. General Principles.—If a party is deceived or misled into believing that the material facts are different from what they really are, or is led to place his belief in the existence of alleged conditions or circumstances which are purely suppositious, and is thereby induced to enter into a contract, it is evident that his consent has not been freely and intelligently given. A party who has been induced to enter into a contract or any kind of obligations by means of material misrepresentations made fraudulently by the other party, to his resulting prejudice, will be entitled to rescind the contract upon discovering the fraud, or to be relieved in a court of equity.¹

The essential elements of a fraudulent misrepresentation have been stated in a large number of cases, somewhat as follows: (a) There must have been a false representation as to a material matter of fact; (b) There must have been a scienter or guilty knowledge of its falsity on the part of the person making it; (c) The person to whom it was made must have been ignorant of its falsity; (d) There must have been an intention that it should have been acted upon by him; (e) The latter must have relied upon the misrepresentation and have been deceived by it, and acted upon it;² (f) Resulting loss

1. *Blampey v. Pike*, 155 Mich. 384; *Grand Rapids R. Co. v. Stevens*, 143 Mich. 646; *Miller v. Voochies*, 115 Mich. 356; *Match v. Hunt*, 38 Mich. 1; *Wright v. Wright*, 37 Mich. 35; *Webster v. Bailey*, 31 Mich. 36.

2. "Where the defendant as a defense in an action for the balance due on a land contract set up that plaintiff had represented that his title was unencumbered, while in fact it was encumbered by a deed given as security for a loan, but

that he discovered the false representations the day after the execution of the contract, and thereafter paid a part of the consideration, held that defendant was in no position to maintain his defense." *Darling v. Haff*, 175 Mich. 304.

"The broker of the defendant represented to plaintiff that the property contained 40 acres, 6-room frame house, small barn and room enough for five horses; 175 fruit trees in good bearing condition,

or damage or injury must be shown as a consequence.³

In Michigan it is not necessary that there be a scienter or guilty knowledge of its falsity on the part of the person making it, as it has been often held that it is immaterial whether a false representation is made innocently or fraudulently, if by its means the party to whom it is made is injured.⁴ A vendor of real property who agrees to convey a merchantable title is not relieved of false representations concerning the title, although he supposes the statements to be true.⁵ If there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for damages caused thereby, either at law or in equity.⁶

A vendor of land must be prepared and able to convey to the purchaser a property substantially corresponding with that bargained for, as well with regard to the title as to the situation and condition of the property, and any material misrepresentation made to induce the bargain, and which so far affects the subject matter that the agreement would not have been entered into except for its influence, is a fraud which will vitiate the transaction, and give the purchaser a right to rescind or to be released from his contract.⁷

fences fair, rents at \$100.00, the representations being untrue, the plaintiff brought suit for damages, held that plaintiff is not entitled to recover where the defendant informed plaintiff of the true character of the property before completing the trade, plaintiff no longer having a right to rely on the statements of the broker." *Aldrich v. Schribner*, 146 Mich. 609.

3. Fraud and representation can exist only when a false statement has been made, but if a statement is false when made, and is made true by the subsequent conduct of the party responsible for such statement, before the time for the per-

formance of the contract arrives, such statement does not amount to fraud or misrepresentation. *Johnson v. Seymour*, 79 Mich. 156.

4. *Patron Fire Ins. Co. v. Pagenkoff*, 213 Mich. 158; *Aldrich v. Scribner*, 154 Mich. 23.

5. *Casset v. O'Riley*, 160 Mich. 101.

6. *Halcomb v. Noble*, 69 Mich. 396; *Steinbach v. Hill*, 25 Mich. 78.

7. *Mather v. Barnes (C. C.)*, 146 Fed. 1000; *Bryan v. Houseman-Spitzley Corp.*, 213 Mich. 236; *Barnhardt v. Hamel*, 207 Mich. 232; *Hutchinson v. Westbrook*, 191 Mich. 484.

§ 205. **Materiality of Representations.**—Not only the falsity of the misrepresentations must be shown, but also the fact that they were material to the transaction, that is to say, not trifling or unimportant, but relating to a substantial matter and of such a character that the party defrauded would not have entered into the contract if he had known the truth of the matter.⁸ Thus, for instance, rescission of a land contract will not be granted on the ground of fraudulent representations of the vendor to the vendee as to the title to the premises, unless that portion of the land to which he cannot make title constitutes the principal inducement to the purchase, and without which the land purchased would be unfit for the purpose intended.⁹

§ 206. **Representations as to Matters of Law.**—One cannot rescind or withdraw from a contract into which he was induced to enter by representations made to him, however false and fraudulent when such representations related to a matter of law, as distinguished from a matter of fact. This rule is supported partly upon the maxim that “ignorance of the law is no excuse” and partly upon the consideration that one is not justified in relying upon representations made to him by another, when the truth of the matter is not within the exclusive or peculiar knowledge of either, and no fiduciary relation exists, but the sources of information are open to both. It is

8. Representations by the defendant in an exchange of real estate that his farm had the best soil, A No. 1, for the raising of all crops; that it was a heavy clay soil; that it was well worth \$12,000, and that in showing plaintiff the farm defendant took him only to the best part; that defendant misrepresented the kind and condition of the farmhouse, saying it cost \$3,000 to build, held insufficient to support a bill for rescission where plaintiff examined the land before purchase and was not entirely ignorant of the character of soils. *Lesser v. Smith*, 212 Mich. 559.

Representations by the defendant, a co-owner of land, that he had found a purchaser who would buy the entire property, and that the property was of little value, and induced his co-owner to transfer his interest to a third party whom he represented to be acting for the purchaser, but who transferred immediately to defendant's wife, held sufficient to entitle the plaintiff to recover damages for the fraud and false misrepresentations. *Lewis v. Jacobs*, 153 Mich. 665.

9. *Coffee v. Newson*, 2 Ga. 422.

generally considered that it is not an actionable fraud to mislead a person as to the nature or strength of his title to property, or to assert that an adverse claimant has a better title, as these are matters of law.¹⁰

A statement in regard to the legal effect of a contract or other instrument or the legal rights and legal duties of the parties under it, is not a fraudulent misrepresentation justifying relief in equity, since it relates to matter of law.¹¹

Representations made by a Railroad Company seeking to obtain a strip of land for its lines, that they were in a position to bring condemnation proceedings, if the owner refused to give the company the right of way over her land and that they could make it expensive for her, while in fact the company had no such power and dealt with the owner, a woman, who was not familiar with business transactions, held, that the Railroad Company could not maintain an action for specific performance on the option obtained by fraud and misrepresentation.¹²

§ 207. **Expressions of Opinions.**—The misrepresentation must be of a material fact, and not a statement which is put forth merely as the judgment, estimate, or opinion of the party making it, or a statement which from the nature of the case, can be nothing more than opinion. Where for instance, the defendant represented that he was the owner of valuable timber land and if plaintiff would enter into an enterprise with him in taking timber from said land and put in a few hundred dollars, he would realize therefrom in 4 or 5 months, three to four thousand dollars profit, "that it was a sure thing and a good investment and could not fail in the time aforesaid to yield plaintiff large returns," it was held that the above expressions were mere matters of opinion and would not sustain an action for misrepresentation and fraud.¹³

In a suit to rescind a contract whereby plaintiff received in exchange for his farm, an electric light plant, and the defendant represented that only \$35.00 worth of fuel per month was necessary and that the income was \$90.00 per month, held

10. *Driver v. White* (Tenn.) 5 S. W. 994.

11. *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702.

12. *Grand Rapids R. R. Co. v. Stevens*, 143 Mich. 646.

13. *Kulesza v. Wyhomski*, 213 Mich. 189.

insufficient to entitle plaintiff to rescind, where the actual cost and income was only a slight difference and to be mere expressions of opinion as to values, upon which men might fairly and honestly differ.¹⁴ Representations by the defendant that the fruit on his farm would pay for it the first year, held not to be a representation concerning a present existing fact, but a mere matter of opinion, the falsity of which would not justify a rescission.¹⁵ If in the general rule that if the parties are dealing at arms length and on equal terms, statements as to value made by the one or the other, even when not mere expressions of opinion, cannot be relied upon and they will not amount to fraud, though known to be false by the party to whom they are made.¹⁶

§ 208. Promises as to Improvement or Use of Real Property.

—Where one induced another to sell land to him on the representations that he means to devote it to a certain use, whereas he has the secret intention to put it to an entirely different use, is not regarded as a mere promise of future action, but as a statement of a material existing fact which will warrant the rescission of the contract.

The converse case is presented where a person is induced to purchase land of no great present value by false promissory representations concerning plans which would greatly increase

14. *Albright v. Stockhill*, 208 Mich. 469. Representations of defendant that if plaintiff would give his time to the business he could make \$1,000 a year over and above his expenses, held a statement concerning a future fact and not a past or present one, and did not entitle plaintiff to rescind. *Burch v. Stringham*, 210 Mich. 48.

Representations by one who has been in actual occupation and cultivation and purports to speak from actual results in regard to its value and productiveness, and in the amount of timber thereon, and in showing the land to the purchaser

took him by an unusual route, to keep him away from those who might have been likely to give him more accurate information, although much of the representations consisted of matters which must ordinarily rest in opinion merely, were sufficiently combined with representations of fact as to justify a rescission by the purchaser. *Wright v. Wright*, 37 Mich. 55.

15. *Draft v. Herselsweet*, 194 Mich. 604.

16. *Hammer v. Martin*, 205 Mich. 359; *Bristol v. Bradiwood*, 28 Mich. 191; *Allison v. Ward*, 63 Mich. 128; *Walker v. Casgrain*, 101 Mich. 604.

its value, especially in the case of sales of suburban property or lots in new towns.¹⁷

Representations that a railroad will enter the town, that a depot will be built nearby; that a street railway will pass the property in question, that other buildings will be erected in the neighborhood; that streets will be laid out and graded; that the lot in question will be connected with water and gas mains and sewers or the like, the accepted rule is that insofar as they relate to matters to be performed in the future by third persons, they are mere expressions of opinion, and not actionable fraud; and insofar as they constitute promises of future action by the vendor himself, they do not constitute ground for the rescission of the sale unless, at the time, he had a specific intention not to redeem them, and simply used this device to deceive and cheat the purchaser.¹⁸

A provision in a land contract "to grade and cinderize the streets within said subdivision, lay cement sidewalks in front of each lot, and plant shade trees on or before one year from date hereof" held sufficient representations to entitle plaintiff to recover damages upon breach of the provision.¹⁹

As a general rule the breach of a promissory representation or the failure to keep a promise made with reference to the subject of the sale, will not warrant a rescission of the contract, although it may give the purchaser an action for damages,²⁰ but such an agreement as to the future may be made

17. *Miller v. Andrews*, 175 Mich. 351.

18. *Day v. Scott*, 153 Ill. 293, 38 N. E. 562; *Mammaux v. Cape May Co.*, 214 Fed. 757; *Wabash R. Co. v. Grate*, 53 Ind. App. 583, 102 N. E. 155; *Canon v. Farmers' Bank*, 3 Neb. 348, 91 N. W. 585; *Western Co. v. Novatny*, 32 S. D. 565, 143 N. W. 895; *Parsons v. Detroit & M. Ry. Co.*, 122 Mich. 462, 81 N. W. 343.

19. *Gitson v. Yale Land Co.*, 212 Mich. 294.

20. Where the defendant made representations concerning certain

premises and stated to the plaintiff that he should go himself upon the land, as their judgments might not agree, and if not satisfied with the land, the defendant would pay his expenses, but if satisfied, the plaintiff should pay them himself, this suggestion impliedly asserts that the defendant had himself exercised an intelligent judgment and in the absence of any intimation of any possible doubt of the facts being as represented, would be likely to dissuade the purchaser from going, and could not shield

an integral part of the contract, where, for instance, a vendor represented that he would make certain improvements in a contract to sell lots on monthly installments, as fast as 25 per cent of the money received would pay for them, but failed to do so, it was held that the purchaser could rescind and recover the money paid.²¹

§ 209. Representations as to Title, Interest.—The vendee in a land contract has the right to rely on the representations made by the vendor concerning the validity, nature, or extent of his title or interest.²² A person making representations as

the defendant from the consequences of his misrepresentations. *Webster v. Bailey*, 31 Mich. 36.

One, who during the negotiations for the sale of lands, professes to have peculiar scientific knowledge as to the probability of lands proving valuable for the production of oil and falsely represents the value for oil, of the lands he is endeavoring to sell, renders himself liable, if the purchaser relies upon such misrepresentations, and is deceived by such false assertions of value. *Kast v. Bender*, 25 Mich. 515; *Picard v. McCormick*, 11 Mich. 68.

21. *Laser v. Fowler*, 114 Ark. 574.

22. Representations made by the vendor of land that he held title to the land, when in fact he only had an equity, in peril of being foreclosed and cut off by an overdue mortgage held to be material and where fraudulently made, entitled plaintiff to a rescission. *Allen v. Talbot*, 170 Mich. 664.

Representations by a party in an exchange of property that he paid \$800.00 for his interest in an assignment to him of a land contract, which on its face showed the entire amount of the contract to be unpaid, save some of the interest,

that everything had been paid on the contract, that he owned the entire interest therein, which representations were false, held to be material, and if relied upon by the plaintiffs, entitle them to the damage sustained. *Wayne v. Herkimer*, 167 Mich. 587.

Where plaintiff brought an action for replevin for a house built by the defendants upon land held by them under a contract of purchase, the plaintiff being vendor, where defendants had removed the house from the premises, it was competent for the defendants to plead as a matter of defense that they were induced to enter into the contract of purchase by false and fraudulent representations of plaintiff as to the state of his title. *Cutter v. Wait*, 131 Mich. 509.

Representations by the defendant that he was the owner in fee simple of certain land in Arkansas worth \$1,600; that it was improved and under a good state of cultivation; that he was in possession of the land by a tenant and was receiving a portion of the crops then growing, and a defendant gave a warranty deed to plaintiff, in an exchange of lands; held sufficient to entitle plaintiff to recover where

to his title is required to disclose the whole truth, and if he places himself in a position where his silence will convey a false impression of the truth, it is as much a fraud as the making of a positive false statement.²³ It is not necessary that the purchaser search the public records with respect to the validity of the vendor's title, if the vendor made express representations concerning his title to land.²⁴

§ 210. Concealment of Encumbrance.—Where the vendor is guilty of false representations regarding the existence of encumbrances on the land, or as to their amount or other material particulars, the vendee has the right to rescind the contract.²⁵ A rescission may be claimed on account of fraudulent concealment or misrepresentation concerning unpaid taxes on

the representations were false and the deed was not a full covenant warranty deed, but one with special covenants against the defendant's own acts. *Wollenslagle v. Runals*, 76 Mich. 545.

23. *Kronfeld v. Missal*, 87 Conn. 491, 89 Atl. 95.

24. *Manley v. Johnson*, 85 Vt. 262, 81 Atl. 919.

25. Representations in an exchange of property that the balance upon a land contract was not to exceed \$2,000.00 and that there was nothing past due, when in fact about \$900.00 was then due and owing, held sufficient to sustain a decree for plaintiffs. *Banski v. Michalski*, 204 Mich. 15.

Representations that defendant's equity in certain property was \$8,200, while in fact it was \$3,650, which representations were relied upon by plaintiffs, held sufficient to sustain a decree for plaintiff rescinding the transaction on the ground of fraud. *Pound v. Clum*, 204 Mich. 28.

In an exchange of property, defendant failed to convey certain property which he claimed he owned, but did agree to convey another piece of property, which he held out to be bringing in \$50.00 per month, while in fact it only brought in \$36.00 per month, and this contract was cancelled, defendant agreeing to convey five lots, to which he did not have title, held that the testimony of plaintiff, that defendant obtained valuable property from her without giving her substantial return, sufficient to sustain a verdict in an action for fraud. *Thomas v. Miller*, 202 Mich. 43.

A party purchasing property, which, according to the vendor's representations, fraudulently made, that the property is unencumbered, can sue for the false representation and the constructive notice furnished by the record of the mortgage will not deprive the vendee of the right to rely on the vendor's statements. *Weber v. Weber*, 47 Mich. 569.

the land,²⁶ or the existence of an attachment on the land with a decree against the former owner,²⁷ or the existence of building restrictions affecting the land.²⁸ A vendor's false representation as to the rate of interest on a mortgage subject to which he sells the land is material in an action based on fraud in the transfer.²⁹

A representation by the vendor that he has made no prior contract for the sale of the same land, and the vendee has no knowledge or notice of an unrecorded prior contract which binds the vendor to sell the premises to another person, is sufficient to entitle the vendee to rescind the contract where he has relied on such representation.³⁰

§ 211. Representations as to Quantity, Boundaries, or Location.—An owner of land is presumed to know the nature, situation and extent of his property. Hence, if a vendor of land represents it as containing a greater quantity, it is not regarded as a mere expression of opinion, and if the purchaser is deceived by it and the deficiency in quantity is material, he may rescind the contract.³¹

If the vendor undertakes to point out the boundaries, or states positively what the boundaries are, the representation is upon a material matter of fact, and if the boundaries so

26. *Wilson v. Balen*, 152 Ill. App. 210.

27. *Mullins v. Aiken*, 2 Tenn. 535.

28. *Tandy v. Weerch*, 154 Cal. 108-197 Pac. 69.

29. *Jackson v. Armstrong*, 50 Mich. 65 14 N. W. 702.

30. *Norris v. Hay*, 149 Cal. 695, 87 Pac. 380.

31. *Worcester v. Cook*, 220 Mass. 539, 108 N. E. 511; *Quarg v. Scher*, 136 Cal. 406, 69 Pac. 96. Plaintiff brought a bill for reformation of a land contract and requiring defendant to refund a part of the purchase price, where defendant lead the plaintiff to believe, by false

representations that the premises contained 110 acres, more or less, when in fact, the premises contained only 104½ acres, held that the shortage was sufficient to entitle plaintiff to relief. *Koch v. Bird*, 174 Mich. 594.

Where the agent of the vendor, having in his possession the minutes of two surveys, showing a deficiency of twenty acres, and knowing that the purchaser knew from representations made to him that he was paying for the full number of acres set forth in his proposal, held that the false representations as to quantity entitled the plaintiff to rescind. *Burchard v. Frazer*, 23 Mich. 224; *Boddy v. Henry*, 126 Iowa 31, 101 N. W. 497.

indicated are not true, so that the purchaser is led to believe that he is acquiring property which actually is not within the true boundaries, it is a fraud which entitles him to rescind the contract.³²

A false representation as to the location of the land sold will give a right of rescission where it was relied on by the purchaser and he was thereby deceived and has been injured.³³ It is a fraud justifying rescission where the sale is induced by false representations as to the width of a street,³⁴ or where

32. *Laubengayer v. Rohde*, 167 Mich. 605; *Lion v. Henry Brodford & Co.*, 209-172. Where defendant showed plaintiff's agent a tract of land which was under negotiations as being the land in question, and the plaintiff's agent examined the land as to its timber, and the plaintiff purchased the land, held that the plaintiff could recover for damages where he reconveyed the land upon discovering that the defendant had fraudulently given the plaintiff's agent the wrong directions, and the plaintiff's agent had examined the wrong tract of land. *Loudon v. Carroll*, 130 Mich. 79.

Where the plaintiff was shown a lot inclosed by a fence and containing a dwelling house, shrubbery, etc., and represented to be the full extent of the property to be conveyed and plaintiff relied upon this representation, which in fact, was untrue, held plaintiff entitled to damages although the misrepresentation was innocently made by defendant. *Banghman v. Gould*, 45 Mich. 481.

Defendant misrepresented the quantity of land in a parcel the defendant was selling and it was no defense that the plaintiff saw the land and examined the same, where the defendant made a posi-

tive assurance of the area of the parcel of land, and the plaintiff relied upon and was deceived by the misrepresentation. *Starkweather v. Benjamin*, 32 Mich. 305.

33. *Match v. Hunt*, 38 Mich. 1. In an action of assumpsit on a contract for purchase of a vacant lot, defendant set up as a defense that plaintiff represented the lot to be in a suburb of New York City; that it was easy of access by steam and trolley lines; that seven adjoining lots had been sold to residents of defendant's city; that the lots were valuable and increasing in value, while in fact these representations were false and fraudulent, held: that defense of fraud was a bar to the recovery of the plaintiff. *Miller v. Andrews*, 175 Mich. 351.

Representations by the agent of the vendor of a lot that the lot was within fifteen feet of Industrial avenue, which representation was false, and relied upon by plaintiff, held, sufficient to entitle plaintiff to sue for damages, where she purchased the lot, it being situated a greater distance than fifteen feet from Industrial avenue. *Smith v. Mich. Realty Co.*, 175 Mich. 600.

34. *Greiling v. Watermolen*, 128 Wis. 440, 107 N. W. 339.

a vendor falsely represents that the premises are bounded by public alleys.³⁵

§ 212. **Representations as to Value.**—Ordinarily assertions as to value of real property are to be regarded merely as expressions of opinion, but such statements may be so expressed or given under such conditions, as to convert them into material representations so that their falsity will warrant the purchaser in rescinding.³⁶ A distinction has been drawn between representations as to the value of the property and representations that the property could be sold upon the market for a certain price, the latter being held to be a representation of fact distinguished from opinion.³⁷

On an exchange of property, representations that a flat was worth \$75,000.00; that the yearly rentals were \$4,200; that the total annual expense of upkeep would not exceed \$600; that all the apartments were rented for \$65.00 per month, and all the garages at \$5.00 per month; that the barn could be made into living quarters at an expense of \$1,000.00; the evidence

35. *Shultz v. Redondo*, 156 Cal. 439, 105 Pac. 118.

36. *Small v. Kennedy*, 137 Ind. 299, 33 N. E. 674; *Meritas v. Farley*, 147 N. Y. Supp. 503; *Wright v. Wright*, 37 Mich. 55. The rule that the vendor has the right to praise his property and to give his opinion concerning its value cannot be extended to warrant false representations as to value and selling qualities, which may be relied upon by the purchaser and operate as an inducement to the deal. *Pratt v. Allegan Circuit Judge*, 177 Mich. 558.

Representations made by the vendor that the property was worth from \$500 to \$2,000 and that the hotel was rented to one Bair, while in fact the property was worth \$250 and the lease to Bair was a mere pretense and not binding upon him, held, that false statements of value intentionally made to one who

is ignorant of the quality and value of the property, is sufficient to entitle the plaintiff to recover the damages he has sustained. *Pinch v. Hataling*, 142 Mich. 522.

One Davis received a receipt from the defendant showing that Davis had paid \$5,000 for a certain piece of real property. The plaintiff relied on the representation made by Davis that he had acquired the premises for \$5,000, and purchased same, but having learned that in fact Davis had only paid \$2,500 for the premises, brought suit to rescind the contract against the defendant, who had fraudulently given the receipt to Davis. Held, that plaintiff could rescind the contract. *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 322.

37. *Pound v. Clum*, 204 Mich. 28; *Hammer v. Martin*, 205 Mich. 359.

showed that all the representations as to the market value and the net income of the flats were exaggerated and untrue, the court held that after making due allowance for the real estate optimism and errors of judgment, the representations were so far out of the range of its real or market value, and that plaintiff could recover, it being unnecessary to determine whether the representations were made in good faith.³⁸ Where a broker represented to the vendee that the vendor's price was \$1,200, and that that was the lowest price for which the farm could be purchased, while in fact the price the owner had set was \$900.00, the court held that if the vendee relied upon this representation, the broker is liable for the difference.³⁹

A statement by the owner of a hotel that it is worth a certain price and that it will earn a certain sum per month, and has been earning that much for the preceding five months, if false, entitles purchaser to recover his damages.⁴⁰

Representations that defendant had title to certain lots; that they were worth \$400 each; that other lots in that neighborhood were selling right along for that price; and where the evidence tended to show that plaintiff had no knowledge of the value of land and told the defendant so, the court held that whether the representations as to the value of the land are mere expression of opinions, and if false, will support an action by the vendee, is a question for the jury, even though the vendee saw the property before purchasing.⁴¹ A representation made by the broker of a land owner that a certain tract of land was worth \$7,000.00 and to induce the plaintiff to believe that the property was worth \$7,000.00, the land owner conveyed the land to the broker, and the plaintiff, and to aid the broker in deceiving the plaintiff as to the real consideration paid received in the plaintiff's presence, the broker's check for \$1,100, the plaintiff subsequently discovered the fraud practiced on him by co-grantee and the land owner, he brought

38. Hillier v. Carpenter, 206 Mich. 594.

39. Hokanson v. Oatman, 165 Mich. 512.

40. Miller v. Voorheis, 115 Mich. 356.

41. Moon v. McKinstry, 107 Mich. 668.

suit to recover the money paid by him, the court held that the false representations entitled plaintiff to recover.⁴²

§ 213. Representations as to Quality, Condition, and Improvements.—A material misrepresentation of fact in regard to the quality, character or condition of land which is the subject of a contract of sale, or in regard to its adaptability to specified uses, or the improvements upon it, or other such matters, furnishes ground for the rescission of the contract when made under circumstances entitling the purchaser to rely upon it.

Under this heading, we have abstracted the following cases holding misrepresentations concerning the quality, condition, and improvements of land sufficient to entitle the defrauded party to rescind in equity or at law.

Representations in an attractive circular illustrating and describing the defendant's houses and bungalows, that they contained modern conveniences, such as "steam heat, adequate sized boiler, and surplus radiation, complete, efficient, economized steam heating plant connected with boiler," upon which plaintiff relied and entered into a land contract for the purchase of a bungalow, which contract did not contain the above representations, it was held that evidence of such misrepresentations not merged in the contract was admissible for the purpose of establishing the charged fraud, and the misrepresentations sufficient to entitle plaintiff to a verdict for damages.⁴³

Representations that the "Improvements were all in and paid for except the paving" while in fact the city had liens on the property for failure to pay assessments, held to be a material statement of fact, and if relied upon by plaintiff, entitled plaintiff to recover his damages.⁴⁴

Representations that the defendant has sold 2,000 acres in the vicinity of the property conveyed, the land being in Cuba, and that the purchasers were going there in six months, and make their permanent homes there, while in fact no land had

42. *Jandorf v. Patterson*, 90 Mich. 40.

44. *State Security & Realty Co. v. Badger*, 200 Mich. 104.

43. *Bryan v. Houseman Spitzley Corp.*, 213 Mich. 236.

been sold to other settlers, held that the representations were not mere matters of opinion, and that they were false and material, entitling plaintiff to recover.⁴⁵

Representations by the vendor of houses that they were all on brick foundations, honestly built, and that the best materials were used in the construction and that the workmanship was excellent, held that a purchaser who has no experience in houses or carpentry, and so informs the vendor, is entitled to rely upon his representations, and may rescind a contract of purchase.⁴⁶

Representations by the vendor that he had examined his land and found the same plaster rock at a certain depth below the surface, that was to be found on adjoining land, where there were valuable quarries, with which the vendee was familiar, and upon which he relied upon making the purchase, held that defendant could recoup his damages, where the land proved to be worthless for plaster purposes in an action by the vendor for the balance of the purchase price.⁴⁷

A representation by the vendor that the land was within three miles of the Village of Newaygo, was the best kind of farm land, would raise good crops, had good productive clay soil, well suited to fruit raising and had on it valuable timber, on which plaintiffs relied, not having seen the property until after purchase, the court held that the plaintiffs were entitled to recover, and the measure of damages is the difference between the value of the premises had they been as represented and what they are actually worth.⁴⁸

Representations made by the agent of the vendor that certain land was good for farming, and would raise crops of all kinds, that it was worth \$50.00 per acre, and that certain acres that were swamp land, could be drained and make good farming land, held to be sufficient to entitle plaintiff to bring an action for fraud to recover his damages.⁴⁹

Representations that certain farming land in the State of Alabama was choice stump land, high and dry, a very fine black

45. *Painter v. Lebanon Land Co.*, 164 Mich. 260.

46. *Culver v. Avery*, 161 Mich. 323.

47. *Morman v. Harrington*, 118 Mich. 623.

48. *Lion v. Henry Bradford & Co.*, 209 Mich. 172.

49. *Barnhardt v. Hamel*, 207 Mich. 232; *Hutchinson v. Westbrook*, 191 Mich. 484.

loam with a clay subsoil; ideal for farming purposes, free and clear of underbrush, without any mire or boggy portion, held sufficient to entitle plaintiff to damages where he relied on the presentations which were false and fraudulent.⁵⁰

Representations made by the defendant that he owned a farm for which he had paid the sum of \$4,000.00, that there was situated upon the land a good house and barn; that there was a family or man living upon and working said farm, all of which were false and fraudulent, held sufficient to entitle plaintiff to a writ of *capias ad respondendum* and an action accrued for damages.⁵¹

Representations made in an exchange of farms that the defendant's farm was good for producing hay; that it was fertile and good for all kinds of crops, when made to the plaintiffs, husband and wife, the former understanding English imperfectly, and the latter at times insane, which representations were relied upon and were false, held sufficient to entitle plaintiffs to rescind.⁵²

Representations by the defendant that he had as good a judge of pine as there was in Michigan examine his land and that he estimated about 5 million pine on the land, $\frac{1}{2}$ white and $\frac{1}{2}$ Norway, that this was a very low estimate; that the pine is of good quality; that the land is worth \$5.00 per acre for farming purposes and that that was the price of farming land in that locality, held sufficient to entitle plaintiff to damages where the representations were false.⁵³

The vendor's false representation as to the rate of interest on a mortgage subject to which he sells is material in an action based on fraud in a transfer, and one who obtains land in a trade and examines the land before the trade has a right to show that he was misled by the representations of the other party if they related to matters of which no one would adequately judge on a casual inspection, such as to the capability

50. *Haener v. McKenzie*, 188 Mich. 27.

52. *Blanpey v. Pike*, 155 Mich. 384.

51. *Merlan v. Kalamazoo Circuit Judge*, 180 Mich. 392.

53. *Halcomb v. Noble*, 69 Mich. 398.

of the land for drainage and the reason why water was standing.⁵⁴

In an exchange of lands defendant represented that the land was a certain distance from a railroad station; that the whole farm except eight acres was good, tillable land; that there were two springs of water and a good well; that the farm was four miles away from a grist mill and saw mill; while in fact all of the above representations were untrue, held, that plaintiff could rescind, he having relied on the representations and not having seen the farm before purchase.⁵⁵

§ 214. Remedies for Fraudulent Misrepresentations.

(a) Of the Purchaser.

1. Jurisdiction of Equity. Courts of equity have jurisdiction to grant relief by way of rescission or cancellation, against contracts or conveyances procured by false representations.⁵⁶ This jurisdiction is said to be concurrent with that of the courts of law.⁵⁷ If the remedy which the law affords, a recovery of damages, is adequate to the case, equity may properly refuse to interfere, but if the injury caused by allowing the contract to stand would be irreparable, if no proceeding at law would afford adequate relief, or if complete justice can be done only by rescinding the fraudulent transaction, then the jurisdiction of equity is clear and undoubted.⁵⁸ Whenever a case of fraud is established, a court of equity may set aside all transactions founded on it, and may also treat acts as having been done which ought to have been done, and convert the party who has committed a fraud and profited by it into a trustee for the injured party.⁵⁹ A court of equity can act only on the conscience of a party, and hence if a party has done nothing which taints his conscience, no demand can attach upon it so as to give jurisdiction.⁶⁰

54. Jackson v. Armstrong, 50 Mich. 65.

55. Match v. Hunt, 38 Mich. 1.

56. Gilbert v. Haire, 43 Mich. 233.

57. Fred Macey Co. v. Macey, 143 Mich. 138; Culver v. Avery, 161 Mich. 322.

58. Summer v. Staton (N. C.), 65 S. E. 902; Tibbins v. Burrell, 46 Pa.

Super. Ct. 466; Garr v. Alden, 139 Mich. 440; Webster v. Bailey, 31 Mich. 36; Alston v. Oregon Power Co. (Ore.), 76 Pac. 964.

59. Bennet v. Harper, 36 W. Va. 546, 15 S. E. 143.

60. Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Hemmer v. United States, 204 Fed. 898.

To avoid multiplicity of suits,⁶¹ or to save the plaintiff from the expense of a double litigation and the hazard of a double recovery against him,⁶² or where he cannot obtain adequate relief without compelling a discovery,⁶³ or an accounting is necessary to ascertain and adjust the relative rights of parties,⁶⁴ or where fraud and want of consideration, relied upon as grounds for the cancellation of a deed, do not appear on the face of the deed, nor on any record on the validity of which the deed depends,⁶⁵ are such special circumstances that give equity jurisdiction. Application for relief in equity is not granted as a matter of course, even when the jurisdiction of the court is undoubted, but must be addressed to the just and sound discretion of the court, to be exercised in conformity with established principles and precedents, but having a regard to the specific facts before the court, and in the exercise of discretion, the court has power to impose on the plaintiff, under penalty of having his bill dismissed, such terms as it may deem that justice requires.⁶⁶

The mere fact that a person might have a remedy at law would not deprive him from coming into a court of chancery and having the agreed consideration, or the value of the premises, declared to be an equitable lien upon the lands.⁶⁷

§ 215. **Actions at Law.**—A court of law can award damages for the breach of a contract or for the deceit or fraud by which a party was induced to enter into it, but cannot rescind a con-

61. *Louisville Ry. Co. v. Ohio Improvement Co.*, 57 Fed. 42.

178; *Thomas v. McCue*, 19 Wash. 187, 53 Pac. 161.

62. *McHenry v. Hazard*, 45 N. Y. 580.

63. *Smythe v. Henry*, 41 Fed. 705.

64. *Eggers v. Anderson*, 63 N. J. Eq. 264, 49 Atl. 578.

65. *Summers v. Abernathy*, 234 Mo. 126, 136 S. W. 289.

66. *Springfield Traction Co. v. Warrick*, 149 Ill. 470, 94 N. E. 933; *Witt v. Sims* (Ga.), 78 S. E. 467; *Shaeffer v. Sheade*, 7 Black (Ind.)

67. Where the plaintiff files a bill for a rescission of the contract but he himself is not in position to rescind, a court of equity will retain jurisdiction and award the plaintiff such damages as he has suffered and will declare such damages a lien upon the real estate conveyed by the plaintiff to the defendant. *Albright v. Stockhill*, 208 Mich. 469; *Merrill v. Wilson*, 66 Mich. 232; *Carroll v. Rice*, Walk. Ch. 373; *Le-fevre v. Chamberlain*, 228 Mass. 294, 117 N. E. 327.

tract or cancel a deed. While the jurisdiction of equity in cases of fraud is undoubted, it does not necessarily follow that a suit is maintainable in equity for the rescission of a contract merely on the allegation of fraud, but there must be, in connection with that element, some special circumstance which renders rescission, by the mere act of the plaintiff and his remedy at law, not adaptable adequately to cure the wrong.⁶⁸

A court of equity will not interfere where the law affords a complaining party a plain, adequate, and complete remedy for the injury he claims to have suffered. It has been held, however, that although a clear right of rescission exists, the remedy which the law affords by the recovery of a judgment for money or property is necessarily incomplete and inadequate because of the lack of power to effect a rescission by a direct adjudication thereof so that, when the law has done its utmost in the way of giving compensation in damages it must still leave the contract in force, which may be a detriment to the complaining party or a benefit to his adversary.⁶⁹

An executed contract for the sale of real estate, where no actual fraud has been perpetrated, will not be rescinded in equity on account of defects in the title, or the discovery of undisclosed incumbrances, or other such matters, since the purchaser has an adequate remedy at law by an action on the covenants or warranties in his deed.⁷⁰

A bill in equity for cancellation of a conveyance is not the proper remedy for injuries suffered by the breach of a condition subsequent or by the failure to redeem promissory representations which do not go to the entire consideration since the injured party can be adequately compensated by an award of damages in an action at law.⁷¹

It is the general opinion that where a party is induced to enter into a contract by fraud or false representations, he has

68. *Hall v. Bell*, 143 Wis. 296, 177 N. W. 967.

69. *Bruner v. Miller*, 59 W. Va. 36, 52 S. E. 995; *Allread v. Harris*, 75 Ca. 687.

70. *Haldane v. Sweet*, 55 Mich. 196; *Ryerson v. Willis*, 81 N. Y. 277.

71. *Lee v. Timken*, 10 App. Div. 213, 41 N. Y. Supp. 979; *Bryan v. Houseman Spitzley Corp.*, 213 Mich. 236; *State Security & Realty Co. v. Badger*, 200 Mich. 104; *Painter v. Lebanon Land Co.*, 164 Mich. 260.

an absolute right to have it rescinded, and that though the facts may be such as would sustain a common law action for fraud and deceit, and though he may, if he chooses, elect to pursue that course, he cannot be compelled to do so, and the existence of such a remedy at law, is no ground for dismissing his suit in equity.⁷²

§ 216. Time to Rescind.—In contracts for the sale or exchange of real property, an unreasonable delay on the part of the injured party to claim and exercise his right of rescission will warrant the imputation of laches and bar his right to relief, and an unexplained and unexcused delay in demanding rescission of the contract will preclude the granting of any relief in equity.⁷³ But no absolute limit of time can be prescribed as all modifying circumstances of the particular case must be taken into consideration.⁷⁴

72. *Baptiste v. Peters*, 51 Ala. 159; *Perry v. Boyd*, 126 Ala. 162, 28 South 711; *Relf v. Cherly*, 23 Iowa 467, *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402; *Wright v. Deniston*, 29 N. Y. Supp. 718.

73. *Carter v. Couch*, 84 Fed. 735; *Davis v. Godart* (Minn.), 154 N. W. 1091; *Thompson v. Milliken*, 93 Kan. 72, 143 Pac. 431; *Bennett v. Hickey*, 112 Mich. 379.

In an exchange of premises the defendant represented that the farm was worth in the open market \$47.50 per acre; that there were no insects of any kind in the locality; that the gravel pits on his farm held the only available gravel pits in that locality; that he had raised 60 bushels of shelled corn the year preceding without fertilization; that there was no overflow from the river. Held: insufficient to entitle plaintiff to rescind where he had examined the land before the exchange, and after living on the farm 3½ months, gave a receipt as follows to defendant, "A full,

complete compromise settlement of any and all differences on land and other trades." *Parkyn v. Ford*, 194 Mich. 184.

Where the defendant fraudulently represented land to be worth \$30.00 per acre; that the original cost had been more than it really was, that the soil was productive especially for hay and wheat; held plaintiff not entitled to rescind where he had examined the premises in company with his father and had relied more on his father's judgment as to its productiveness and value, and occupied the land three years before making complaint. *Buxton v. Jones*, 120 Mich. 522.

74. Four years. *Harington v. Paterson*, 124 Cal. 542; 57 Pac. 476; *Martin v. New Rochelle Co.*, 162 N. Y. 599; 57 N. E. 1117.

Three years. *Watson Coal Co. v. Casteel*, 68 Ind. 476; *Woodfolk v. Morley*, 98 Tenn. 467; 40 S. W. 479.

Two years. *Richardson v. Lowe*, 149 Fed. 625; *Margo Coal Co. v. Halderman* (Mo.), 163 S. W. 828.

A plaintiff coming into court to demand the rescission or cancellation of a contract, and being met with the imputation of laches from his long delay, may show that he was lulled into inaction by the fraudulent conduct or deceitful representations of the defendant,⁷⁵ or that after learning the facts which would justify a rescission, he refrained from taking steps to terminate the contract, at the request of the defendant and as a mere matter of forbearance or indulgence to him, to give him an opportunity to perform his part of the agreement or in reliance on his promise to perform or to remedy the matters objected to.⁷⁶ Where a party protests promptly on discovering that he has been defrauded in making a contract, and then enters into negotiations for a peaceable settlement which fail, a bill for cancellation of the contract, filed within a reasonable time after such failure, is not barred by laches.⁷⁷

A party having the right to rescind a contract for false representations, and aware of the facts that give him such right, will be held to have waived or lost his right after a comparatively short delay in claiming it, if in the meantime, the circumstances or conditions have so changed that it is no longer possible for him to put the opposite party in statu quo or so that the effect would be to confer a greater benefit upon the party rescinding, or inflict a heavier loss upon the other party, than would have occurred if the rescission had been made promptly.⁷⁸

Eighteen months. *Hammond v. Wallace*, 85 Cal. 522; 24 Pac. 837.

Fifteen months. *Wilbur v. Flood*, 16 Mich. 40.

75. *Cornell v. Crane*, 113 Mich. 460.

76. *Hubbardson Lumber Co. v. Bates*, 31 Mich. 158.

77. *Fred Macey Co. v. Macey*, 143 Mich. 138.

78. *Disbrow v. Jones*, Har. (Mich.) 102; *Martin v. Ash*, 20 Mich. 166; *Dunks v. Fuller*, 32 Mich. 242.

At an execution sale, the mortgagee's agent told the plaintiff that

the mortgage was paid, and later upon discovering the fraud and false representations, plaintiff brought suit to rescind, but the court held that plaintiff was not entitled to relief, where he had made no inquiry as to the whereabouts of the mortgage and notes, and the public records showed that the mortgage was not discharged, and had been recognized as a subsisting lien in deeds executed subsequent to the time of the alleged payment of the mortgage. *Flowers v. Reilly*, 125 Mich. 562.

Where the purchaser of a farm discovered the fraud practiced upon him in its sale soon after taking possession, but retained possession for nearly a year, and made his payments as provided by his contract, he was not entitled to then rescind the contract and recover the full amount of his payments on the purchase price.⁷⁹

Possession from 1867 to 1872 of premises conveyed to him, although the false representations were discovered soon after purchase, held to have barred plaintiff in an action for rescission on the false representations.⁸⁰

§ 217. Waiver of Right to Rescind by Acts or Assertions of Ownership.—One who receives property under a contract and discovers that he has been defrauded by false representations, should thereafter treat the property as a reasonably prudent and careful man is bound to treat the property of another found in his possession, but not his own property. If the vendee discovers an undisclosed incumbrance, a defect in the title, a deficiency in quantity, fraud or false representations, or other circumstances which would justify him in rescinding the contract, but thereafter, having knowledge of such circumstances, exercises acts of ownership over the land without asserting any intention to rescind, he will be held to have waived his right to do so.⁸¹ It is an assertion of ownership such as precludes a subsequent rescission, if the vendee raises crops on the land.⁸²

79. *Mestler v. Jefferies*, 145 Mich. 598.

80. *Wright v. Peet*, 36 Mich. 213.

81. *Bennet v. Hickey*, 112 Mich. 379; *Hamburger v. Berman*, 203 Mich. 78.

Where the parties deal at arms-length, acting in their own independent investigations, it was held plaintiff failed to meet the burden of proof as to allegations of fraud and misrepresentations in an action to rescind in the purchase of a tract

of land. *Loud Lumber Co. v. Sterling*, 203 Mich. 119.

Where a party who has been defrauded continues to deal with the party who has wronged him, as though such fraud had not been perpetuated upon him, or continues any course of conduct which indicates that he relies upon the contract, such conduct on his part will constitute a waiver of the fraud and an affirmation of the contract. *Dinnan v. Bloomfield Hills Land Co.*, 214 Mich. 54, and cases cited.

82. *Buxton v. Jones*, 120 Mich. 522.

§ 218. **Restoration of Status Quo.**—When a contract for the sale of land has been consummated by the execution and delivery of a deed to the vendee, and he seeks to rescind the sale, such person must tender, or at least offer to make and deliver a deed or reconveyance.⁸³ But the tender of such a reconveyance is not a condition precedent to the maintenance of a bill or action for rescission, it being sufficient if a proper deed is produced and tendered in court at the trial.⁸⁴

The purchaser under an executory contract for the sale of land, if he wishes to rescind for fraud or misrepresentation, must first restore the possession of the premises to his vendor, or at least make an offer in good faith to do so.⁸⁵ There is an exception to this rule where it is shown to be necessary for the purchaser to retain possession of the land for the purpose of securing his reimbursement or indemnity, as, for instance, where he has made costly improvements on the land,⁸⁶ and in cases where the vendor is shown to be insolvent, so that the land itself is the only fund to which the purchaser can look for the return of his purchase money or the cost of his improvements.⁸⁷

Where a contract for the sale of land is rescinded, at the instance of either party, the vendee having been in possession of the land under the contract, is accountable for a proper rent or rental value of the premises, or for the value of his use and occupation of them,⁸⁸ and is usually reckoned as being equivalent to the fair or reasonable rental value of the land.⁸⁹

83. *Wilbur v. Flood*, 16 Mich. 40.

84. *Jandorf v. Patterson*, 90 Mich. 40.

85. *Maddock v. Russel*, 109 Cal. 417; 42 Pac. 139; *Loveridge v. Coles*, 72 Minn. 57, 74 N. W. 1109; *Cox v. Holkerboer*, 200 Mich. 86. Plaintiff brought a bill in equity for rescission of a land contract, alleging fraud and false representations on the part of the defendant in regard to the character of the farm and personal property thereon. The bill did not allege an offer to restore possession of

the farm nor a tender of the personal property, and the court held that plaintiff could not rescind while holding possession of the farm. *Milbourn v. Maatsch*, 211 Mich. 544.

86. *Thompson v. Sheppard* (Ala.), 5 So. 334.

87. *Kansas Land Co. v. Hill*, (Tenn.) 11 S. W. 797; *Allbright v. Stockhill*, 208 Mich. 469.

88. *Allen v. Talbot*, 170 Mich. 664; *Hack v. Norris*, 46 Mich. 587.

89. *Allen v. Talbot*, 170 Mich. 664.

§ 219. **Damages.**—The measure of damages to which a purchaser is entitled, is, as a general rule, the actual loss or injury sustained by the purchaser as the fair legal and natural result, under all the circumstances, of the vendor's breach, but no recovery can be had for speculative or remote damages, and if no special damages are shown nominal damages only can be recovered.⁹⁰

Where the vendor, without fraud on his part, is unable to convey a good title, although he represented to the vendee that he had good title, and the defect was unknown to him at the time the contract was made, the purchaser is not entitled to recover damages for the loss of his bargain, but can recover only the purchase money paid with interest, and expenses incurred on the faith of the bargain.⁹¹

But where the vendor acts in bad faith in failing or refusing to convey, as where he is chargeable with fraud, the purchaser's recovery is not limited to the purchase money paid with interest and expenses, but he is entitled to compensation for his actual loss, or as it is called, damages for the loss of his bargain.⁹²

Where it is established that a purchaser is entitled to damages for the loss of his bargain, his measure of damages is the actual injury he has sustained by the vendor's breach of the contract, together with a return of the purchase money where paid, with interest, from date of payment, and such sums as he has paid for taxes, and where he has been in possession, he is entitled to the reasonable value of improvements made on the land in good faith, less the value of his use and occupation of the premises.⁹³

Substantial damages for a failure or refusal to convey includes a loss occasioned by a rise in the value of the land, and ordinarily the measure of damages is based on the value of the land at the time of the breach of the contract.⁹⁴

90. *French v. Bent*, 43 N. H. 448;
Radford v. Wilson, 2 Bosw. (N. Y.)
237.

91. *Hammond v. Hannin*, 21 Mich.
374.

92. *Allen v. Atkinson*, 21 Mich.
351.

93. *Bartlett v. Smith*, 146 Mich.
188; *Cox v. Holkeboer*, 200 Mich. 86.

94. *Dikeman v. Arnold*, 71 Mich.
656.

Where the purchaser brings an action for the false and fraudulent representations of the vendor in regard to the character or quality of the land, the measure of damages is the difference between the value of the premises had they been as represented and what they are actually worth.⁹⁵

§ 220. Remedies of the Vendor—In General.—The general rules in relation to misrepresentation and fraud are equally applicable in cases where the purchaser is the party guilty of making the false statement, subject to the qualification that the vendor has ordinarily special means of knowledge concerning the nature, condition, and quality of the land, and is therefore not to be deceived by such false representations. Actual fraud on the part of the purchaser entitles the vendor to rescind.⁹⁶

§ 221. As to Area.—A false statement by the purchaser concerning the area of the land contracted for is ordinarily a statement of a matter equally within the knowledge of the vendor, and does not constitute fraud or misrepresentation.⁹⁷

§ 222. As to Title.—False representations by the purchaser as to title to the land may be ground for rescission,⁹⁸ but not when they are mere expressions of opinion nor where the vendor does not rely on them or the circumstances are not such as to entitle them to rely on them.⁹⁹

§ 223. As to Value of Land.—A false statement by the purchaser as to the value of the land is generally a statement of opinion concerning a matter equally within the vendor's knowledge and does not constitute fraud or misrepresentation; but the contract may be avoided where the vendor lives at a distance, and there is concealment of material facts coupled with misrepresentations that prevent investigations.¹⁰⁰

95. *Lion v. Henry Bradford & Co.*, 209 Mich. 172, and cases cited.

96. *Garr v. Alden*, 139 Mich. 440.

97. *Marshall v. Lewis*, 4 Litt. (Ky.) 140.

98. *Smith v. Woodson* (Ky.), 92 S. W. 980.

99. *Saltonstall v. Gordon*, 33 Ala. 149.

100. *Garr v. Alden*, 139 Mich. 440; *Storrs v. Scougale*, 48 Mich. 387.

In an action for specific performance of a written contract for the sale of a farm in Michigan where the plaintiff falsely represented the

§ 224. **As to Thing of Value Given for Land.**—The purchaser has ordinarily special means of knowledge concerning the thing which is to be given in exchange for the land, and a false representation by him concerning such thing of value may amount to fraud or misrepresentation. Where the land is conveyed for stock in a corporation, fraudulent representations as to the stock or notes is ground for rescission.¹⁰¹ A conveyance of land included by fraudulent representations as to a patent will be set aside at the instance of the vendor.¹⁰²

§ 225. **Non-Disclosure and Concealment.**—The failure of the purchaser to disclose material facts to the vendor, does not amount to fraud either at law or in equity if relations of special trust and confidence do not exist between the parties.¹⁰³ The contract will not be set aside because the purchaser did not inform the vendor as to the number of acres in the tract sold,¹⁰⁴ or that a large manufacturing establishment was to be located in the neighborhood,¹⁰⁵ or a railroad is to be built near the land.¹⁰⁶

value of the land to the owner residing outside of the State of Michigan, it was held that the false representation of the plaintiff was a bar to his action for specific performance. *Swimm v. Bush*, 23 Mich. 99.

101. *Graham v. Moffett*, 119 Mich. 303.

102. *Dunks v. Fuller*, 32 Mich. 242. Representations made by defendant that certain land was worth a large sum of money, that the defendant had conveyed the land to one Davis who had made a down payment of \$12,000 in cash and had given two first mortgages for the balance, and that the said Davis was a man of property and that the balance could be collected from the said Davis; and that there were no other mortgages or liens upon the property, whereby the plaintiff

was induced to exchange certain real estate for the two mortgages upon the property sold by defendant to Davis and the plaintiff later discovered that all these representations were false, the court held that the plaintiff was entitled to have the exchange set aside in equity. *Goodrich v. Smith*, 87 Mich. 1.

103. *Burt v. Mason*, 97 Mich. 129; *Williams v. Spurr*, 24 Mich. 335.

104. *Eichelberger v. Barnitz*, 1 Yeates (Pa.) 307.

105. *Standard Steel Co., v. Stamm*, 207 Pa. St. 419, 56 Atl. 954.

106. *Burt v. Mason*, 97 Mich. 127, where it was held that no legal or moral obligation rests upon the proposed purchaser of land to inform the owner of the prospective construction of a railroad to a point near the land, and the concealment of such information can not be re-

Where both parties know that there are iron deposits on the land, the vendor cannot complain because the purchaser represents that he desires the land for the timber thereon.¹⁰⁷

§ 226. Pleading and Practice—Equity—Requisites of Bill of Complaint.—A bill in equity for the rescission of a contract should set forth with certainty and particularity the facts constituting the ground upon which rescission is demanded.¹⁰⁸ The bill should allege the special circumstances founding a jurisdiction in equity and justifying an exercise of the discretionary power of the court, such as facts which make it appear with reasonable certainty that irreparable injury will result to the plaintiff if the relief asked is not granted; that he has no adequate remedy at law, or the reasons why he cannot obtain adequate relief by a suit or defense at law, though it is sufficient in this respect to plead the facts from which the inadequacy of any remedy at law can be clearly perceived.¹⁰⁹ The bill of complaint should show that the plaintiff is free from any fault, breach of contract or fraud so that he has a good standing in equity.¹¹⁰ Averments must also be made which will show the particular acts or conduct on the part of the defendant which give rise to the action.¹¹¹

In general, a bill for rescission or cancellation must plead the essential facts with clearness and certainty so that the defendant may be able to answer without confusion.¹¹²

§ 227. Allegations of Fraud or False Representations.—It is not sufficient to charge fraud in general terms, but the specific misrepresentations must be set forth, and these must be stated distinctly and positively and not indirectly or by way of inference.¹¹³ Where it is charged that a conveyance was ob-

garded as a false representation of fraud entitling the plaintiff to rescind.

107. *Williams v. Spurr*, 24 Mich. 335.

108. *Manning v. Drake*, 1 Mich. 34; *Wilson v. Eggleston*, 27 Mich. 257.

109. *Abbot v. Gregory*, 39 Mich. 68; *Lieberman v. Sloman*, 118 Mich. 355.

110. *McCredie v. Buxton*, 31 Mich. 383; *Pearce v. Ware*, 94 Mich. 321; *Farr v. Childs*, 204 Mich. 19.

111. *Parkyn v. Ford*, 194 Mich. 184; *Milbourn v. Maatsch*, 211 Mich. 554.

112. *Tong v. Martin*, 15 Mich. 60; *Fox v. Pierce*, 50 Mich. 500.

113. *Wilson v. Eggleston*, 27 Mich. 257.

tained by means of fraud practiced by an agent of the defendant, the name of the person alleged to have so acted must be averred.¹¹⁴ It is further necessary, in alleging fraud or false representations as a cause of action, to aver distinctly the falsity of the representations in question, the defendant's intention by means of them to deceive or cheat the plaintiff and that the plaintiff relied on the representations made to him, and that he was thereby misled and induced to enter into a transaction to which he would not have assented, but for his reliance on such false representations.¹¹⁵

§ 228. Describing Instrument.—The bill should set out the agreement, state the time, place, and circumstances of its execution and delivery, and allege the parties thereto. It was the old practice to incorporate the contract or deed in the bill of complaint, but this is no longer necessary by reason of the Michigan Circuit Court Rules. It is sufficient to set forth the substance only of the instrument, and to attach a copy of the instrument to the bill of complaint as an exhibit. This method has a very important advantage over the old practice, because it enables the opposing counsel to grasp the essential facts of the instrument relied upon by the pleader, without reading the entire instrument and simplifies the pleading.

The Circuit Court Rules of Michigan provide:

“Whenever a cause of action or defense is based upon a written instrument or document, the substance only of such instrument or document shall be set forth in the pleading, and a copy thereof shall be attached to the pleading as an exhibit, which shall be deemed to be a part of the pleading, or said copy may with like effect be set forth in the pleading, provided that such copy need not be attached or set forth when the written instrument or document is one the form of which is prescribed by statute. Profert shall not be required.¹¹⁶

§ 229. Showing Promptness and Diligence.—The bill is generally held to be insufficient unless it contains an allegation showing when the plaintiff claims to have discovered the fraud

114. *Aldrich v. Schribner*, 146 Mich. 609. 397; *Banski v. Michalski*, 204 Mich. 15.

115. *Morris v. Vyse*, 154 Mich. 253; *Watson v. Wagner*, 202 Mich. 116. Mich. Cir. Ct. Rule 21, Sec. 6.

which is the basis of the action, for the court must be able to determine whether he acted with due diligence in repudiating the transaction or claiming his right to rescind.¹¹⁷ If the dates set forth in the bill show the lapse of a considerable period of time after the original transaction so as to raise a presumption of laches if not sufficiently explained, there must also be allegations explaining or adequately excusing the delay.¹¹⁸

§ 230. Offer to Restore or Do Equity.—The plaintiff must offer in his bill to restore to the defendant whatever property or valuable consideration he may have received under it, as the prime object of a suit for rescission is to undo the original transaction and restore the former status.¹¹⁹

This offer may be made in the form of an allegation that the plaintiff is ready and willing to repay to the defendant all sums advanced by him under the contract,¹²⁰ or to execute a deed of reconveyance. And if the dealings between the parties have been such that there must be a consideration and adjustment of their relative rights and claims, it is sufficient for the plaintiff to allege in his bill that he is ready to do and willing to do equity in the premises.¹²¹

§ 231. Answer or Counterclaim.—The answer in a suit for rescission or cancellation should not take issue upon immaterial points, but should cover all the equities of the case.¹²² The defendant may set up as many defenses as he may have, provided they are not inconsistent with each other.¹²³ In an action to rescind a contract for the purchase of lands on the ground of defective title in the vendor, the answer of the latter should set forth his title,¹²⁴ or if it is alleged that he made fraudulent

117. *Richardson v. Green*, 61 Fed. 423.

118. *Fisher v. Boody*, 1 Curt. 206, Fed. Cas. 4,814; *Axtel v. Chase*, 77. Ind. 74; *Sears v. Smith*, 2 Mich. 243; *Haff v. Jenney*, 54 Mich. 511.

119. *Jandorf v. Patterson*, 90 Mich. 40; *Milbourn v. Maatsch*, 211 Mich. 544.

120. *Merril v. Wilson*, 66 Mich. 232.

121. *Wright v. Dickinson*, 67 Mich. 580; *Place v. Brown*, 37 Mich. 575.

122. *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134.

123. *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. 346.

124. *Topp v. White*, 12 Heisk. (Tenn.) 165.

representations as to his ability to convey the title in fee simple, his answer should set forth his ability to comply with the representations.¹²⁵ In an action to cancel a deed on the ground of fraud the defendant cannot plead the plaintiff's fraud to defeat a recovery,¹²⁶ and a charge of misrepresentations made by the defendant is not answered by an allegation of misrepresentations on the part of the plaintiff.¹²⁷ In a suit to cancel a deed on the ground of fraud of the grantee, a cross-bill based on breach of the covenants of warranty and against encumbrances in the deed cannot be maintained.¹²⁸ The defendant may counterclaim for sums which would be justly due him if the transaction in question were rescinded, as, for example, in the case of a sale or exchange of lands, for the rents of the property while in the other's possession, or for money spent in making repairs or improvements; but he must plead these matters specifically and allege all necessary facts and figures.¹²⁹

§ 232. **The Bill of Complaint** can be drawn in the following form:

FORM OF BILL OF COMPLAINT

State of.....
In the Circuit Court for the County of.....In Chancery.
John Doe and Mary Doe,
 Plaintiffs, }
 vs. }
Richard Roe,
 Defendant.

TO THE CIRCUIT COURT FOR THE COUNTY OF.....

John Doe and Mary Doe, plaintiffs, herein, respectfully show unto this Honorable Court:

1. That these plaintiffs being the owners in fee of the following described real estate: (here describe real estate) and

125. Wellboon v. Tiller, 10 Ala. 305.
126. Paschal v. Hudson (Tex.), 169 S. W. 911.
127. Chaney v. Coleman, 77 Tex. 100, 142 S. W. 370.
128. McKenzie v. Call, 176 Mich. 198.
129. Fountain v. Semi-Tropic Land Co., 99 Cal. 677, 34 Pac. 497; Ray v. Haviland, 72 Ind. 364; Walker (Iowa), 61 N. W. 930; Barnes v. Gilmore, 6 N. Y. Civ. Proc. R. 286.

also being the owners of a large amount of personal property consisting of: (here describe stock) of the estimated value of _____, upon which farm the plaintiffs lived and conducted a farming business, were induced, on the _____ day of _____, A. D. 19____, and prior thereto, by Richard Roe of _____ to exchange said farm and personal property thereon for the following described property, in the City of _____, said county, and state, namely: (here describe property) and also induced these plaintiffs to enter into a land contract for the purchase of the property last above described, for the sum of _____; the sum of _____ being credited to these plaintiffs on said contract, being the estimated value of the real estate and personal property first above described belonging to these plaintiffs and the balance payable at the rate of _____ per month as per said contract, a true copy of which is hereto attached and marked exhibit "A" and made a part of this Bill of Complaint.

2. That for the purpose of inducing these plaintiffs to execute a deed of said farm and bill of sale of said farm property to said defendant, and to enter into said land contract for the purchase of the property last above described, said defendant Richard Roe falsely, deceitfully and fraudulently represented and pretend that the real estate last above described was worth _____, and that the said property could sell, at any time, in the market for more than _____ in cash, and that he, defendant Richard Roe, could sell the same in the market for cash for _____ and more in _____ days time; that the net yearly rentals from said property was _____ and upwards and that the same were and could be rented so as to yield a net income of _____ and upwards per year after paying all expenses; that the expense of heating the building thereon, the same being an apartment house, would not exceed the sum of _____ and that the total expense connected with said apartment house would not exceed the sum of _____, and that all the apartments were then rented for _____ per month each. That these plaintiffs not being familiar with the value of property in the City of _____, and having no occasion to doubt said statements

of said defendants, relied thereon and were induced thereby to make such exchange of property and to enter into the said land contract, as above described.

3. That these plaintiffs, since making said exchange of said property and entering into said land contract, are now, on to-wit: the.....day of....., A. D. 19....., informed and believe and charge the truth to be that the said last above described real estate, was not at the time said representations were made, worth.....and that the same was not worth to exceed....., and could not be sold in the market for; that the net yearly rental from said property was not.....and would not exceed.....; that said apartments were not and could not be rented so as to pay a yearly income of.....and upwards after paying all expenses; but plaintiffs allege that the income therefrom would not exceed.....after paying all expenses; that the annual expense of heating said apartment house and the payment of the annual taxes and other expenses on said property has amounted to a sum much in excess of.....and that the actual amount is more than twice that sum; that said apartments were not, at the time, all rented for.....per month, and that the said defendant also made other false and fraudulent representations in respect to said property which were relied upon by these plaintiffs.

4. That plaintiffs further show that they stand ready and willing to pay to said defendants all such sums as may be found to be legally and equitably due to said defendants, if any, and to surrender possession of said apartment house to the said defendants; these plaintiffs having on the.....day of....., A. D. 19....., given notice to the said defendant that possession of the said apartment house would no longer be held by these plaintiffs, and the said defendant has refused to accept the offer of these plaintiffs to surrender possession of said apartment house.

5. These plaintiffs further show that the said defendant, Richard Roe, is attempting to sell and dispose of the said real estate secured from these plaintiffs, which was credited in the sum of.....upon said land contract for the purchase of said apartment house, and also to dispose of

his interest in said apartment house to the injury of these plaintiffs unless he is restrained from so doing by the injunction of this Court.

6. These plaintiffs further show that they have no remedy against said defendant, save in a court of equity and to the end that said Richard Roe, defendant in this suit, may:

(1) Make full, direct and perfect answer to all and singular the matters hereinbefore stated and charged.

(2) That the said land contract between said plaintiffs and said defendant be set aside and declared null and void for fraud.

(3) That the said plaintiffs recover from said defendants the sum of.....dollars paid on said land contract, as appears by the endorsements thereon, and the moneys expended on said apartment house, with interest, less a fair rental value for the time said plaintiffs occupied said apartment house.

(4) That the amount so found due be decreed to be a lien upon the real estate deeded by these plaintiffs to said defendant first above described in paragraph one of this bill, and credited on the land contract for the purchase price of said last above described property described in paragraph one of this bill, and that said sum so found due be decreed to be due and payable herewith and that as evidence of said lien, the decree entered in this cause, or a certified copy thereof, may be recorded in the office of the Register of Deeds for the County of.....

(5) That the People's Writ of Injunction may issue out of and under the seal of this Honorable Court restraining said defendant from selling, assigning, or otherwise disposing of the real estate secured from these plaintiffs described as follows:, and from selling, assigning, or otherwise disposing of this interest in said apartment house described more fully, as.....until the further order of this court.

(6) That these plaintiffs may have such other and further relief in these premises as shall be agreeable to equity and good conscience, and as to this court may seem meet.

And these plaintiffs will ever pray, etc.

Plaintiffs.

Attorney for Plaintiffs.

State of Michigan, }
County of Wayne, } ss.

On this..... day of.....A. D. 19.....,
before me a Notary Public in and for said county, personally
came the above named plaintiffs, John Doe and Mary Doe, who
made oath that they had read the foregoing bill of complaint
by them subscribed, and that the same is true, except as to
those matters stated upon information and belief, and as to
those matters, they believe it to be true.

Notary Public, Wayne County, Mich.

My commission expires.....

§ 233. Action at Law—Requisites of Declaration.—Chapter
14 of the Judicature Act of Michigan has made several impor-
tant changes in the law regarding declarations, and is supple-
mented by new rules of court (1916).

Declarations formerly in common use “may” be used in the
“actions which are in this act retained but” no declaration
shall be deemed insufficient which shall contain such informa-
tion as shall reasonably inform the defendant of the nature of
the case he is called upon to defend.” The tendency of the
legislature and courts before the Judicature Act, to eliminate
the ultra refinements and technicalities of old forms of com-
mon law pleading has been commented upon at various times
by the Supreme Court of Michigan. “Extreme niceties and
technical exactness is not favored.”¹³⁰

All pleadings must contain a plain and concise statement
without repetition of the facts on which the pleader relies in
stating his cause of action or defense and no others.¹³¹

Pleadings need not and should not allege implications of fact
or presumptions of law, nor conclusions of law, nor irrelevant

130. Green v. Mich. Cent. R. Co., 131. Mich. Cir. Ct. Rule 21, Sec. 2.
168 Mich. 104-110.

or scandalous matter, and must be as brief as the nature of the case will permit.¹³²

Dates, sums and numbers may be expressed in either figures or in words.¹³³

Whenever a cause of action or defense is based upon a written instrument or document, the substance only of such instrument or document shall be set forth in the pleading, and a copy thereof shall be attached to the pleading as an exhibit, which shall be deemed to be a part of the pleading, or said copy may with like effect be set forth in the pleading, provided such copy need not be attached or set forth when the written instrument or document is one the form of which is prescribed ¹³⁴ by statute. Profert shall not be required.

By the new rules of court it is provided that "inconsistent causes of action or defenses are not objectionable, and when the party is in doubt as to which of two or more statements of facts is true he may in separate counts or paragraphs allege or charge facts, although the same may be inconsistent with other counts or paragraphs in the same pleading, and will be entitled to such relief as the facts may warrant, under either count or paragraph."¹³⁵

"Each count or division of a pleading shall, so far as practicable, be divided into paragraphs consecutively numbered, each containing as near as may be a separate allegation."¹³⁶

"Every pleading shall be signed by a party or his agent or attorneys."¹³⁷

§ 234. Form.—The Judicature Act expressly provides that the forms of declarations in common use may be employed or a briefer statement can be used containing "Such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend."

The formal parts of a declaration are: First, the title, (a) as to the court, and (b) as to the time when filed or delivered; second, the venue in the margin; third, the commencement; fourth, the body or statement of the cause of action, consisting of three principal parts, viz., (a) the right, (b) the injury to

132. Mich. Cir. Ct. Rule 21, Sec. 3.

133. Mich. Cir. Ct. Rule 21, Sec. 2.

134. Mich. Cir. Ct. Rule 21, Sec. 6.

135. Mich. Cir. Ct. Rule 21, Sec. 7.

136. Mich. Cir. Ct. Rule 21, Sec. 2.

137. Mich. Cir. Ct. Rule 21, Sec. 9.

such right, and (c) the consequent damages; and fifth, the conclusion.

It is hardly necessary to comment upon the title or venue. What is termed the “commencement” of the declaration follows the venue in the margin and precedes the more circumstantial statement of the cause of action. In suits by infants or by or against assignees, executors, administrators, etc., the commencement is varied from the form employed when the parties sue or are sued in their individual capacities; infants are stated to sue by guardian or next friend, etc.

After the commencement of the declaration, the body or statement of the cause of action follows in natural order, and in every description of action, consists of the right, whether founded upon contract or tort independent of contract, the injury to such right and the consequent damages.

“The plaintiff in his declaration, and the defendant in his plea, shall state the name of the attorney or attorneys by whom they respectively appear.”¹³⁸

In the conclusion of a declaration the plaintiff shall set forth his claim for judgment whether for money or property, or both.¹³⁹

§ 235. Declaration.—The following brief form has been adopted by the State Bar Association, and has been deemed suitable and sufficient.

STATE OF MICHIGAN

In the Circuit Court for the County of.....

John Doe,
Plaintiff,
vs.
Richard Roe,
Defendant.

To the Circuit Court for the County of.....

John Doe, the plaintiff in this suit, by....., his attorney, complains of Richard Roe, defendant herein, the said Richard Roe having been duly summoned to answer the said John Doe, of a plea of trespass on the case, and says:

138. Mich. Com. Laws 1915, Sec. 12,404; Judicature Act Mich., Chap. 13, Sec. 1.

139. Mich. Cir. Ct. Rule, Sec. 6.

1. That on.....day of....., 19....., the defendant offered to sell him a certain farm then owned by the defendant, described as.....

2. That to induce the plaintiff to purchase said farm the defendant represented to the plaintiff that the said farm was thoroughly tile drained throughout.

3. That the plaintiff was thereby induced to purchase said farm for \$....., which was then and there paid to the defendant, relying on the truth of the said representations.

4. That the said representations were not true; and a large part of said farm was entirely without tile drain.

5. That the defendant made the said representations fraudulently, knowing them to be false and for the purpose of inducing the plaintiff to purchase the said farm.

6. In the alternative, that the defendant, in consideration of the purchase of the said farm by the plaintiff, warranted that the said land was thoroughly tile drained throughout.

7. That the said farm was not as warranted, but a large part of it was wholly without any tile drains.

8. Wherefore the plaintiff claims a judgment for the sum of.....dollars.

Attorney for Plaintiff.

Business address:

§ 236. Pleadings and Briefs Used in Late Michigan Cases Involving Actions for Fraudulent Misrepresentations Both in Equity and in Law.—

BANSKI v. MICHALSKI, 204 Mich. 15—

- (a) Brief Statement of Fact.
- (b) Bill of Complaint.
- (c) Exhibits "A," "B" and "C" of Plaintiff.
- (d) Answer.
- (e) Decree.
- (f) Authorities Cited by Plaintiff. Brief for Plaintiff.
- (g) Authorities Cited by Defendant. Brief for Defendant.

LIAN v. HENRY BRADFORD & CO., 209 Mich. 172—

- (a) Brief Statement of Fact.
- (b) Declaration.
- (c) Plea.

BANSKI v. MICHALSKI, 204 Mich. 15—

(a) Brief Statement of Fact.

A bill of complaint was filed to rescind a land contract for the fraudulent misrepresentations made by the defendant as to the ownership and value of certain farm property, the quality of the farm soil and the defendant's representations as to the financial conditions of the land contract. From a decree for the plaintiff setting aside and cancelling the contract, the defendant appealed, which was affirmed by the Supreme Court.

(b) Bill of Complaint.

STATE OF MICHIGAN

In the Circuit Court for the County of Wayne—In Chancery

Teofil Banski, and	}
Apolonia Banski,	
Plaintiffs,	
v.	
Anthony Michalski,	}
Defendant.	

Teofil Banaski and Apolonia Banski, of the City of Detroit in said County of Wayne, plaintiffs, represent unto the court as follows:

1. That as husband and wife on the 21st day of August, A. D. 1916, they purchased on land contract from Jacenty Wrona and Sophia Wrona, his wife, all that certain piece or parcel of land situate and being in the township of Hamtramck, Wayne County, State of Michigan, and described as follows, to-wit: Lots numbered thirteen (13) and fourteen (14) of Race & Haass Subdivision of the westerly one-half ($\frac{1}{2}$) of the easterly one-half ($\frac{1}{2}$) of quarter section 21, ten thousand acre tract, in the Village of Hamtramck, Wayne County, Michigan, and that the plaintiffs still have the use and possession of the same at the time of filing this bill of complaint. That the said contract and the assignment thereof herein-after stated are recorded in Liber 1166, page 355, of Deeds, in the Register of Deeds Office for Wayne County. And the plaintiffs hereby make the said contract and assignment, and the records thereof, a part of this bill of complaint, and hereby refer to them for greater certainty. That the said property consists of two distinct lots and a one-family dwelling house on one of the lots. Plaintiffs further say that the said property was purchased by them for the sum of forty-five hundred (\$4,500.00) dollars; that they have thus far paid on the land contract for this property the sum of eighteen hundred fifty (\$1,850.00) dollars; and that its present value amounts to fifty-two hundred (\$5,200.00) dollars, and that the same has been occupied as a homestead by the said plaintiffs ever since the date of purchase.

2. Plaintiffs further represent that on or about the 17th day of June, A. D. 1917, the said defendant, Anthony Michalski, came to them and represented himself to be the owner of a forty (40) acre tract of farm land lying and being situate in the township of Casco, St. Clair County, State of Michigan, more particularly described as the west half of the

east half of the northwest quarter of section four (4), in town four north of range fifteen east, containing forty acres more or less; and that the said Anthony Michalski then and there proposed to plaintiffs an exchange of his said farm property on the plaintiff's property described above. And the plaintiffs further represent that neither of them had or has any knowledge of the quality of farm soil or its adaptability for farming purposes, and so informed the said defendant Anthony Michalski.

3. Plaintiffs further represent that the said Anthony Michalski then and there informed them that the said farm land so owned by him as above described was formerly owned by his father and that his said father had paid for the said farm the sum of four thousand four hundred (\$4,400.00) dollars, the said farm was mortgaged for the sum of two thousand (\$2,000.00) dollars, and that there was a balance due on said farm the sum of two thousand (\$2,000.00) dollars; that the soil was rich and fertile and that it was the best soil to be found for raising crops and for general farming purposes. The plaintiffs further state that they believed the representations so made to them by the said Anthony Michalski to be true and relied upon his honesty and truthfulness in making these representations, and so informed him, and that the said Anthony Michalski then and there deposited the sum of one hundred (\$100.00) dollars with plaintiff Teofil Banski, as evidence of good faith, and which the plaintiffs now allege was only a trick and scheme to allay any suspicions these plaintiffs might have regarding the honesty and veracity of the said Anthony Michalski.

4. And the plaintiffs further represent that thereafter, on Sunday, June 17, 1917, the said Anthony Michalski with two other real estate agents, named Adam Buczynski and W. Rybicki, friends of the said Anthony Michalski, induced plaintiffs to take an automobile ride with them to the said farm to look over the same. That the plaintiffs did go with them to the said farm in the said automobile and that on the way to the said farm, the said Anthony Michalski and his said two friends uncovered a quart of whisky and induced this plaintiff Toefil Banski to drink about one-third of this quantity by the time they looked at the farm. Plaintiffs further say that while on this trip they were completely under the influence of the said Anthony Michalski and his said friends and that they had no opportunity then and there to make an independent investigation relative to the value of the said farm, and when plaintiffs requested an opportunity to visit the owner of the adjoining farm to ascertain the value of the farm he was buying, the said Anthony Michalski and his friends stated to him that it would be useless to do so as they did not know who the owner of the adjoining farm was, and then and there they again assured them that the farm was worth the money as above stated.

5. Plaintiffs further state that upon returning from the farm to their home on the same day they were again told by the said Anthony Michalski that the said farm was purchased by his father for four thou-

sand (\$4,000.00) dollars and the live stock and farming implements for the sum of four hundred (\$400.00) dollars and that it was then and at the said time and place worth the sum of forty-four hundred (\$4,400.00) dollars. That these statements and representations were relied upon by these plaintiffs and believed by them to be true.

6. That then and there in consideration of the truthfulness of the representations and statements so made by the said Anthony Michalski, they agreed to exchange and trade the equity in their land contract for the above described farm, and plaintiff Teofil Banski further states that an oral agreement was then and there made between the said parties whereby plaintiffs were to assign their interest in their land contract to the said Anthony Michalski, and that the said Anthony Michalski was to assign to them his interest in the land contract for this property, paying to them the difference in value between the two pieces of property amounting to the sum of one hundred fifty (\$150.00) dollars. That the said Anthony Michalski then drew up a paper in the English language purporting to be an agreement embodying the terms as agreed upon, and that plaintiffs were then informed by the said Anthony Michalski that the said paper contained all the statements and representations made by him as above stated, and all the terms of the proposed trade. That these plaintiffs are unable to read or write the English language and again relied upon the honesty and truthfulness of the said Anthony Michalski and believed that he told the truth regarding the contents of the said paper and upon his request the said plaintiff Teofil Banski, signed the said agreement for himself and his wife, a copy of which said agreement is hereto attached and marked Exhibit "A."

7. That thereafter, on the 20th day of June, 1917, the said plaintiffs, still believing and relying upon the representations and statements made by the said Anthony Michalski, actually assigned and transferred all their right, title and interest in and to their property above described to the said Anthony Michalski, a copy of which assignment is hereto attached marked Exhibit "B." Plaintiffs further state that instead of receiving an assignment of the land contract for the farm property from the said Anthony Michalski, he, the said Anthony Michalski handed to the plaintiff Teofil Banski an assignment of the said land contract for the farm property signed by one John Grochala, a total stranger to these plaintiffs and a bill of sale to the live stock and farm implements to be found on said farm, also signed by the said John Grochala.

8. Plaintiffs further state that upon inquiring of the said Anthony Michalski as to the identity of the person who signed those papers as J. Grochala, the said Anthony Michalski informed them amid a great deal of derision and laughter that that was his father who had owned the farm. Plaintiffs then and there immediately suspected that all was not right with the deal they had just made, and the plaintiff Teofil Banski further states that he immediately went out to the said farm and inquired of the adjoining farm owner as to the value of the farm, land and quality of the soil and was informed and believes it to be true

that the said farm land is worth not to exceed forty-five (\$45.00) dollars per acre and that the soil is of very inferior quality and not easily adaptable for farming purposes. That neither the said Anthony Michalski nor his father ever had any interest in or title to the said property. Plaintiff further states that the said live stock and farm implements found on the said farm are not worth more than one hundred (\$100.00) dollars.

9. Plaintiffs further represent that all the representations and statements so made by the said Anthony Michalski, aforesaid, were false and fraudulent and that the said Anthony Michalski well knew at the time of making these statements and representations that the same were false, that he made such statements and representations to deceive these plaintiffs and as an inducement for them to make the trade of their property as aforesaid; that they relied upon the said statements and were induced to part with their property. That by the means of said statements and representations they were wrongfully and fraudulently deprived of their said property by the scheming and machinations of the said Anthony Michalski. That the said farm property is worth not more than twenty-six hundred (\$2,600.00) dollars, the vendee's interest being not more than six hundred (\$600.00) dollars; that the equity of these plaintiffs in the contract assigned by them to the said Anthony Michalski is more than fifteen hundred (\$1,500.00) dollars over and above the total consideration received by them in the exchange with the said Anthony Michalski.

10. Plaintiff Apolonia Banski further represents that she did not freely and voluntarily assign her interest away in their said property, and that she had no voice in the making of this deal, of the terms or conditions thereof; that she was persuaded to sign her rights away in her said property by her said husband Teofil Banski, against her will and without receiving any benefit, value or consideration for her equity in her said property. That she has received no money, property, property rights, nor anything of value whatsoever for assigning away her property rights, as will more fully appear by the assignment of the said farm property, a copy of which is hereto attached and marked Exhibit "C."

11. Plaintiffs further state that the said contract for the sale of said farm, is not assignable without the consent of the vendor therein endorsed in writing thereon, as appears by the terms of the said contract a copy of which is hereto attached and made a part hereof. That said assignment is neither legal nor valid and that it is absolutely void and without effect, not having been properly witnessed or acknowledged, according to the statute in such case made and provided. That the said assignment does not vest any interest in the plaintiffs whatsoever, the property therein being deficiently described as: The west half of the east half of the northwest of quarter section four, in town north of range fifteen east, containing forty (40) acres more or less.

12. Plaintiffs further state that after learning of the deceit and the fraud committed upon them by the said Anthony Michalski, they did,

on June 23rd and July 10th, A. D. 1917, tender to the said Anthony Michalski the sum of two hundred ninety (\$290.00) dollars together with the assignment of the farm property and bill of sale above described and requested the said Anthony Michalski then and there to return to them the said land contract and assignment thereof of their own property, but the said Anthony Michalski refused to do so and still refuses to do so, and has started summary proceedings against plaintiffs before one Michael Kluczynski, Justice of the Peace, of Hamtramck township to obtain possession of their said property and threatens to obtain judgment against plaintiffs and evict them from their said homestead, and plaintiffs fear he will do so unless restrained by an order and injunction of this court from proceeding with the said lawsuit before the justice of the peace and unless the said justice of the peace be restrained from hearing and determining the said lawsuit, until the further order of the court, and that the said Anthony Michalski be further restrained from starting any other proceedings to obtain the possession of said property or from actually taking possession of the said property until the further order of this court, and from selling, assigning, transferring or disposing of the said equity in the said land contract.

13. Plaintiffs further state that they always have been ready and willing and are now ready and willing to return to the said Anthony Michalski all moneys, property and property rights received from him in this said transaction, and hereby make an offer and tender to the said Anthony Michalski of the said sum of two hundred ninety (\$290.00) dollars, with interest, together with the bill of sale for the personal property and the assignment of the contract for the farm property.

In consideration thereof these plaintiffs pray:

I. That the said Anthony Michalski, the defendant herein, may without oath, his answer on oath being waived, full, true, direct and perfect answer make to all and singular the matters herein stated and charged.

II. That the said assignment from the plaintiffs to said defendant, may be vacated and set aside and decreed to be null and void, as against these plaintiffs, and that the said assignment conveys no right, title or interest in the said land or any part thereof to the said defendant Anthony Michalski.

III. That the said Anthony Michalski may be decreed to release to these plaintiffs all right, title and interest which he claims, or appears to have in the said land by color of the said assignment or otherwise.

IV. And that the said Anthony Michalski may be decreed to have no right, title or interest whatever in or to the said land or any part thereof, and that these plaintiffs may have leave to cause such decree to be recorded in the office of the Register of Deeds for Wayne County.

V. That the said Anthony Michalski may be restrained by an injunction of this court from taking any legal steps to obtain the possession of the premises herein involved, or from selling, assigning or disposing

of the said property, or from disposing the plaintiffs of the said property.

VI. And that these plaintiffs may have such further or other relief in the premises as shall be agreeable to equity and good conscience.

Teofil Banski,

Apolonia Banski.

Arthur A. Koscinski,

Attorney for plaintiffs.

State of Michigan,
County of Wayne. ss.

On this 13th day of July, A. D. 1917, before me, a notary public, in and for said county, personally appeared Teofil Banski and Apolonia Banski, the plaintiffs above named, and severally made oath that they have heard read the foregoing bill of complaint by them subscribed and know the contents thereof and that the same is true of their own knowledge, except as to the matters which are therein stated to be on information and belief and as to those matters they believe it to be true.

Leonard F. Kowalski,

Notary Public, Wayne County,
Michigan.

My commission expires Oct. 15, 1919.

Exhibits "A," "B" and "C" of plaintiff:

Exhibit "A"

Hemtremck, Mich.

Deth June 18-1817

Des is Degremet between Anthony Michalski and T. Banski and 'i's waw, A. Banski Farm. Known as the west half, of, the east half, of the northwest quarter of, Section Four (4) in Town Four (4) North of Range Fifteen en contoiny Forty acres more or lest in Permit of Witness.

Anthony Michalski.

Adam Buczynski.

Exhibit "B"

In consideration of one (\$1.00) dollar to us in hand paid by Anthony Michalski, hereby grant, sell and convey to him all our right, claim and interest in and to the within contract and in to the premises therein described, with all benefits to be derived therefrom, and said Anthony Michalski, in consideration of the premises hereby assumes and agrees to perform and carry out all parts of said contract (not already performed) within provided to be performed by the party of the second part thereto. Dated June 19, 1917.

Teofil Banski, (Seal)

Apolonia Banski. (Seal)

In presence of

Jacon Gaffke,

W. Rybicki.

State of Michigan, }
County of Wayne, } ss.

On this nineteenth day of June, one thousand nine hundred and seventeen, before me, a notary public in and for said county, personally ap-

peared Teofil Banski and Apolonia, his wife, known to me to be the persons who executed the foregoing assignment of contract and acknowledged the same to be their free act and deed.

Jacob Gaffke,

Notary Public, Wayne County, Mich.

My commission expires Oct. 22, 1919.

Exhibit "C"

This Contract, made the fourth day of March, one thousand nine hundred and fourteen.

Between John Karp, Township of Casco, St. Clair County, Michigan, of the first part, and Andy Peklo, of the City of Detroit, Wayne County, Mich., of the second part, Witnesseth, as follows:

1. Said first party for himself, his heirs, executors and administrators, agrees to sell to said second party all certain piece or parcel of land, situate in the Township of Casco, County of St. Clair, State of Michigan, known and described as the west half of the east half of the northwest quarter of section four, in town four, north of range fifteen east, containing forty acres, more or less.

In addition to the above lands, the following personal property is included: 1 gray horse, 1 plow, 1 set drags, 1 set double harness, 2 buggies, 1 small cultivator, what hay is now over the horse stable, all the tools now on the farm and all straw and (forthwith, after full payment by said second party of the purchase money, taxes, interest and insurance hereinafter mentioned, and on the performance by said second party at the times and in the manner hereinafter mentioned, of all the conditions herein specified to be by him done and performed) to execute, or cause to be executed, to said second party a good and sufficient warranty deed for the said premises, to be delivered on the surrender of this duplicate contract.

2. Said second party for himself, his heirs, executors, administrators and assigns, agrees to purchase said premises, and to pay therefor, to said first party at his office or place of business, the sum of two thousand six hundred dollars in the manner following, to-wit: Six hundred dollars on delivery of this contract, of this amount five hundred dollars is to be cash, and one hundred dollars chattel mortgage on crops raised on said farm, and due September 1, 1914, and the balance as follows: March 4, 1915, \$100.00 and interest 6 per cent. on all remaining unpaid. March 4, 1916, from \$100.00 to \$300.00 and 6 per cent. on all remaining unpaid. March 4, 1917, \$300.00 or more and a like amount each year thereafter with 6 per cent. interest on amount unpaid until full sum is paid in full, with interest at the rate of 6 per cent. per annum until due, and at the rate of 6 per cent. per annum thereafter, payable annually on the fourth day of March in each year upon so much of the purchase money as remains unpaid and,

3. Said second party also agrees that during the life of this contract, and within the time prescribed by law he will pay or cause to be paid, all taxes and assessments, ordinary and extraordinary, that

shall by lawful authority be taxed or assessed upon the said land and appurtenances, including the taxes for the year A. D. 1914 and that the payment by him of such taxes on this contract shall not in any case be considered and treated as a payment on or offset against either the interest or principal of this contract.

4. Said second party further agrees to cause the buildings erected and to be erected upon said land to be insured and kept insured against loss and damage by fire, at his expense, by insurers and in manner and amount approved by said first party, and to either assign the policy and certificates of insurance to said first party or cause the same to be made payable, in case of loss, to said first party as his interest may appear.

5. And said second party further agrees that all buildings, erections and improvements now upon or that may hereafter be placed upon said premises, shall stand as security for the payment of the moneys hereby covenanted to be paid by him and shall not be removed from said premises without the written consent of said first party.

6. And it is mutually agreed, that in case said second party shall fail to pay taxes when due or effect insurance as aforesaid, said first party may pay such taxes, and effect such insurance, and all moneys paid by said first party for such taxes and insurance, and all charges thereon may be added to the amount due on this contract, payable forthwith, with interest at the rate of 6 per cent. per annum, from the date of such payments and shall be treated as a part of the money payable under this contract.

7. And in case default shall be made by said second party, his heirs, executors, administrators or assigns, in any of the conditions above stipulated to be by him performed, it shall and may be lawful for said first party if he shall see fit, to declare this contract void, such declaration to be made by brief notice thereof, addressed to said second party and delivered to him personally, or deposited in the post office at Lenox, Mich., and said first party shall have the right to re-enter upon the said premises at any time after such default, and shall be at liberty to sell the same to any person or persons whomsoever, without being liable in law or equity to said second party or any person claiming under him for any damages in consequence of such sale, or to return any payments made on account of this contract, and any payments that shall have been made may be held by said first party as stipulated damages for the non-performance of this contract. And said first party shall have a right to recover all damages sustained by reason of the holding over of said second party without permission; and, in case this contract shall be so declared void, the party of the second part shall thenceforth be deemed a mere tenant at will under said first party and shall be liable to be proceeded against under the provisions of the statutes regulating summary proceedings to recover possession of land, being Chapter 308 of the Compiled Laws of Michigan,

1897, and the acts amending the same, without notice to quit. Notice to quit being hereby expressly waived by second party.

8. It is hereby expressly understood and declared that time is and shall be deemed and taken as of the very essence of this contract; and that unless the same shall in all respects be complied with by said second party at the respective times and in the manner above limited and specified, that said second party shall lose and be debarred from all rights, remedies or actions, either in law or equity, upon or under this contract.

9. And it is further agreed, that this is a duplicate contract, and that no assignment, sale, pledge or transfer of this contract shall be of any validity or force whatever, or in any manner binding upon said first party unless such assignment, sale, pledge or transfer be made on the copy hereof in the hands of said first party and said first party first consent in writing upon the copy hereof in the hands of said second party to such assignment, sale, pledge or transfer.

10. Second party is not to cut any standing timber, unless dead, until one-half of the purchase price is paid, at which time he may, if he desires, take a warranty deed, with abstract showing title clear to that date, and give a mortgage back for balance at payments of three hundred dollars or more, with interest at 6 per cent., payable March 4th, of each year thereafter; interest to be on full amount then remaining unpaid at the time of each payment.

In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written.

Andy Peklo. (L. S.)

In presence of

Anthony C. Bykowski.

In consideration of one dollar and other valuable consideration to him in hand paid, I hereby sell, assign, transfer and set over to Anthony Rekla, all my right, title and interest in and to the within contract, and hereby guarantee to said Andy Peklo, his heirs and assigns, payment of the within contract in accordance with the terms thereof.

Dated 8th day of April, A. D. 1916.

Andrew Peklo (L. S.)

Witnesseth by

F. H. Addison.

Know all men by these presents, that Andrew Peklo, a single man, party of the first part, for and in consideration of the sum of one dollar and other valuable considerations lawful money of the United States of America, to him in hand paid by John Grochala and Zofia Grochala, his wife, parties of the second part, the receipt whereof is hereby acknowledged, have sold, assigned and transferred, and hereby does sell, assign and transfer to the said parties of the second part, all the right, title, and interest of the said party of the first part in and to a certain real estate contract, dated the 4th day of March, in the year one thousand nine hundred and fourteen made by John Karp, of

Casco, St. Clair County, Mich., to Andy Peklo and by said Andy Peklo duly assigned to Anthony Peklo and conveying the west half of the east half of the northwest quarter of section four, in town north of range fifteen east, containing 40 acres more or less.

Signed, sealed and delivered the 16th day of May, A. D. 1917.

State of Michigan, }
County of Wayne, } ss.

For value received, we, the undersigned, hereby sell, assign and transfer all our right and title in and to the land contract described herein to Teofil Banski, of Detroit, Michigan.

Dated June 20, 1917.

John Grochala,
Zofia Grochala.

In presence of

Frank J. Hirt.

(d) Defendant's Answer.

STATE OF MICHIGAN

In the Circuit Court for the County of Wayne
In Chancery

Teofil Banski and Apolonia Banski,	}	No. 60046
Plaintiffs,		
v.		
Anthony Michalski,	}	
Defendant.		

1. In answer to paragraph one of said bill of complaint, this defendant, although having no personal knowledge upon the subject, is informed and believes and therefore admits that the said plaintiffs purchased the property described in said paragraph one, upon the date therein alleged, and also admits that although contrary to the legal rights of the defendant herein, that the said plaintiffs are still in possession of said premises.

In answer to the remainder of said paragraph one, this defendant admits that the said land contract and assignment thereof is recorded in Liber 11666, at page 355 of Deeds in the office of the Register of Deeds for said Wayne County. That the purchase price of said property was \$4,500, and that the said plaintiffs have paid the sum of \$1,850 upon said property. This defendant, however, denies that the said property is of the value of \$5,200, but on the contrary avers that same is worth approximately \$3,000.

2. In answer to paragraph two of said bill of complaint, this defendant avers that during the month of June, 1917, that he purchased and was the owner of the property described in said paragraph two, and admits that he advised the said plaintiffs of that fact during certain interviews with them in the said month of June, which said interviews were brought about by certain real estate men, who were endeavoring to effect an exchange of the said defendant's farm property for the said plaintiff's property referred to in paragraph one hereof.

This defendant, however, denies that he proposed an exchange of said properties of the parties hereto, but in that connection avers that said exchange was brought about by said real estate men, with whom the said plaintiffs had listed their property for the purpose of obtaining an exchange thereof for any desirable farm property.

In answer to the remainder of said paragraph two, this defendant positively denies that the said plaintiffs had no knowledge of the quality of said farm soil or its adaptability for farming purpose, but on the contrary, avers that before becoming acquainted with the said plaintiffs or having any interviews with them regarding said farm, that the said plaintiffs, in company with certain real estate men, had visited said farm, carefully examined the same, and decided to effect a purchase thereof if possible.

3. In answer to paragraph three of said bill of complaint, this defendant denies that he ever informed the said plaintiffs that said farm property was formerly or at any time owned by his father, or that his father had ever been the purchaser thereof. This defendant admits, however, that during the said month of June there was a mortgage upon said farm property in the amount of \$2,000 which is still undischarged, but this defendant denies that he had made any representation whatever regarding the richness or fertility of said farm soil or regarding its adaptability for raising crops, although this defendant avers that the soil on the said farm is of good quality and well adapted for general farming purposes.

In answer to the remainder of said paragraph three, this defendant denies that he made any representations to the said plaintiffs regarding the condition of said farm, for the purpose of effecting a sale hereof to the said plaintiffs, or that they acted in any way upon any representations made by this defendant regarding said farm at the time of purchasing the same. This defendant admits that after having agreed with the said plaintiffs to exchange his said farm property for the property owned by the said plaintiffs, that he, the said defendant, made a deposit of \$100.00 upon said exchange, but denies that said deposit was made by the said defendant for the purpose of effecting any dishonest purpose whatever, but that the said deposit was made in good faith by the said defendant.

4. In answer to paragraph four of said bill of complaint, this defendant denies that he went with the said plaintiffs to see said farm, and on the contrary this defendant avers that he never went with the said plaintiffs to said farm at any time prior to the time that the exchange of the properties of the parties hereto was effected, which was on, to-wit, the 20th day of June, 1917. This defendant avers however, that he is informed and verily believes that the said plaintiffs had visited said farm on the said 17th day of June, 1917, but avers that at the time of so doing the said plaintiffs were accompanied by the said Adam Buczynski and the said Wrybicki, the real estate agents, who brought about the said exchange of the said defendant's farm for the said plaintiffs' property located in the said Village of Hamtramck; that in addition

to said real estate agents, their wives, and families also accompanied them on said trip, but this defendant avers that at that time he had no knowledge that the said plaintiffs contemplated visiting and examining said farm, and further avers that that fact did not come to his knowledge until the following day.

This defendant, therefore, has no knowledge regarding the amount of whisky which the said plaintiffs drank at the time they visited said farm, or how much they were under the influence thereof at any time during said journey. This defendant therefore denies that at the time of visiting said farm that the said plaintiffs were in any wise under his influence, or that they were prevented in any way from investigating said farm. Defendant avers, however, in that connection, that he is informed and verily believes that at the time of visiting said farm, on the said 17th day of June, 1917, that the said plaintiffs made a thorough and careful examination of the same, and that upon the results of said examination they, the said plaintiffs, decided to purchase said farm and instructed the said real estate agents to interview the owner thereof and to purchase the same if possible.

5. In answer to paragraph five of said bill of complaint, this defendant again denies that he had any interview whatever with the said plaintiffs at the time they visited the said farm on the said 17th day of June, 1917, or that he made any representations to them regarding said farm.

6. In answer to paragraph six of said bill of complaint, this defendant denies that he made any agreement with the said plaintiffs regarding an exchange of the respective properties of the parties hereto on the said 17th day of June, 1917, but on the contrary, avers that on the 19th day of June, 1917, the said real estate men came to this defendant and advised him that they had a purchaser for his said farm, who was willing to exchange an equity in a house and lot in the Village of Hamtramck, in payment of this defendant's interest in said farm. That the said real estate agents, for the purpose of effecting said sale, requested this defendant to accompany them to the home of the said plaintiffs who were at that time total strangers to this defendant. That in accordance with said request, this defendant went with the said real estate agents to the home of the said plaintiffs where he was introduced to them and interviewed them for the first time regarding an exchange of said property; that the said plaintiffs thereupon advised this defendant that they were desirous of exchanging their said property in the Village of Hamtramck for defendant's said farm.

That after considerable discussion regarding the terms of said exchange, it was agreed between the parties hereto that this defendant was to exchange his interest in said farm to the said plaintiffs for their interest in their said property in the said Village of Hamtramck, and in addition thereto, this defendant agreed to pay the said plaintiffs an additional sum of \$150.00.

In answer to the remainder of said paragraph, this defendant admits that at the time of said interview, he, the said defendant, signed the said paper known therein as Plaintiff's Exhibit A, but denies that he

made any false representations regarding the contents thereof, and denies also that the said plaintiffs or either of them signed said Exhibit A, as appears upon the face thereof, the same being signed by no one but the defendant herein.

7. In answer to paragraph seven of said bill of complaint, this defendant admits that the said plaintiffs assigned and transferred their interest in their said land contract to said defendant, on the 20th day of June, 1917, but denies that said assignment was made by the said plaintiffs, in reliance upon any statements or representations which had been made by this defendant. This defendant also admits that his interest in said farm was assigned by the said John Grochala direct to the said plaintiffs, the reason for which is hereinafter stated, and in further answer to said paragraph seven, this defendant alleges as follows:

(a) That the defendant herein purchased said farm from one John Grochala on, to-wit, the 12th day of June, 1917; that at the time of purchasing the same, the said Grochala's equity therein amounted to the sum of \$2,500; that in payment of said Grochala's equity in said farm, this defendant paid to the said Grochala the sum of \$50.00 in cash as a deposit, and assigned to him an equity amounting to \$1,300, which this defendant then owned in a certain house and lot located in the Village of Hamtramck, Michigan, and also, thereupon, agreed to pay to the said Grochala the further sum of \$1,200 in cash; that in consideration thereof, the said Grochala thereupon executed and delivered to this defendant a bill of sale of all personal property on said farm, including certain live stock, farming implements, etc., and agreed to assign to this defendant the contract of the said Grochala, under which he was purchasing said farm, upon payment by this defendant of the balance of said purchase price, which amounted to \$1,200.

(b) That the said bill of sale to this defendant was executed by the said Grochala in the form of a separate instrument from the said Grochala's land contract, under which he, the said Grochala, was purchasing said farm.

(c) That because of the fact that this defendant had not paid to the said Grochala the full purchase price of said farm, the latter had not assigned to him the said Grochala's contract of purchase of his said farm, which assignment was not to be made until the full purchase price of said farm was paid by this defendant.

(d) That at the time of the exchange between the parties hereto of their respective properties, as aforesaid, on the 20th day of June, 1917, this defendant had not paid to the said Grochala the balance of the latter's equity in said farm, for which reason the said Grochala had not given to the said defendant an assignment of the said Grochala's contract; that because of that fact this defendant informed the said plaintiffs that the said farm contract would be assigned to them by the said Grochala instead of being assigned to them by this defendant; that at the time of closing of said deal with the said plaintiff, Teofil Banski, one Jacob Gaffke and this defendant, together with the said real estate agents, Buczynski, and the said Wrybicki, all went together in an auto-

mobile to a bank in the Village of Richmond, Michigan, which is in the vicinity of said farm property, where they met the said John Grochala and thereupon completed an exchange of said property; that in making said exchange, this defendant paid to the said Grochala a certified check for \$1,000, and \$50.00 in cash; that upon receipt of that amount from this defendant, the said Grochala assigned his said land contract upon said farm direct to the said plaintiffs, which was done at the request of this defendant for the purpose of avoiding the execution of an unnecessary assignment of said contract, which would have been necessary had the said Grochala assigned the same to this defendant, and the latter assigned the same to the said plaintiffs; that upon receiving an assignment of said farm contract, the said plaintiffs delivered to this defendant an assignment of their property in said Village of Hamtramck and referred to in paragraph one hereof. That at the time of closing said deal, all of the parties hereto well understood and were perfectly satisfied with the terms and conditions thereof; that after said deal had been closed, all of the parties hereto, with the exception of the said Banski's wife, drove in said automobile to the said farm at the request of the said Teofil Banski, so that the latter could make certain arrangements regarding the necessary care of said farm and the live stock thereon; that thereafter, the parties hereto returned to the said village of Hamtramck, and the said plaintiff, Teofil Banski, repeatedly expressed himself as satisfied with the said purchase.

8. In answer to paragraph eight of said bill of complaint, this defendant denies that he ever stated to the said plaintiffs that he was related to the said Grochala, or that at the time of closing said deal the said plaintiff, Teofil Banski, expressed any dissatisfaction therewith. This defendant admits, however, as previously stated that after closing said deal, the parties hereto visited said farm property, but denies that at the time of so doing any inquiries were made regarding the value of said property.

This defendant also denies that he had no interest in said farm property, and denies that the live stock and farm implements on said farm were not worth over the sum of \$100.00, but on the contrary, avers that the same was worth approximately \$400.00.

9. In answer to paragraph nine of said bill of complaint, this defendant denies that he has ever, at any time, made any false representations to the said plaintiffs or any one else regarding said farm property or that the said plaintiffs were in any wise deceived or misled by any statements which the said defendant made regarding said farm, and denies that the said plaintiffs have been defrauded or wronged in any way whatsoever. This defendant denies that the said farm is not worth more than \$2,600, but on the contrary avers that the same, together with the personal property thereon, is worth approximately \$5,000, and denies that the said defendant's interest therein were not over \$600.00, but on the contrary, avers that the same was worth approximately \$2,650, and this defendant denies that the equity of the said plaintiffs in the contract assigned by them to this defendant exceeded this defend-

ant's interest in said farm in any amount whatsoever, but on the contrary, avers that the interest of this defendant in said farm, and the personal property thereon was worth equally as much as the said plaintiff's interest in their said property, which was assigned to this defendant.

10. In answer to paragraph 10 of said bill of complaint, this defendant denies that the said plaintiff, Apolonia Banski, executed said assignment against her will, and denies that she had no voice in making said deal, but on the contrary avers that she had equally as much to say in arranging said deal as any of the other parties hereto. This defendant, however, avers that he has no knowledge regarding any statements made by the said plaintiff, Teofil Banski, to the said wife, or regarding the amount of money or property which she may have received from her said husband for executing her said assignment.

11. In answer to paragraph 11 of said bill of complaint, this defendant denies that the assignment of said contract for the sale of said farm by the said Grochala to the said plaintiffs was irregular or illegal in any respect, and on the contrary, avers that the same was in all respects properly executed and valid.

12. In answer to paragraph 12 of said bill of complaint, this defendant admits that some time after said deal had been closed, that the said plaintiffs tendered to him a small sum of money and requested a return of the assignment of their said property in the Village of Hamtramck, which was refused by this defendant as wholly uncalled for and unjustifiable, and for the further reason that this defendant had paid a consideration of \$2,650 for the said plaintiffs' interest in their said property, which would be a total loss on his part if he should be required to re-assign to said plaintiffs their said land contract.

In answer to the remainder of said paragraph 12, this defendant admits that he has commenced summary proceedings before a justice of the peace, for the purpose of obtaining possession of the property purchased by him from the said plaintiffs, and in that connection avers that the said plaintiffs are now holding possession of the said property contrary to the legal rights of the defendant in the premises.

13. In answer to paragraph 13 of said bill of complaint, this defendant admits that the said plaintiffs have offered to pay him the sum of \$290.00 providing that he returns to them the assignment of their said land contract, but denies that the said plaintiffs have ever offered to pay to this defendant the amount which he has paid for the said plaintiffs' property, and denies also that the said plaintiffs are entitled to a re-assignment of their said contract from this defendant.

Wherefore, this defendant denies that the said plaintiffs are entitled to the relief prayed in their said bill of complaint or to any portion thereof, and prays that the same may be dismissed with reasonable costs to the defendant in this behalf most wrongfully sustained.

Anthony Michalski,

Defendant.

Charles Bowles,

Attorney for Defendant.

State of Michigan, }
 County of Wayne, } ss.

Anthony Michalski, being duly sworn, deposes and says that he has read the foregoing answer by him subscribed, and knows the contents thereof, and that the same is true except the matters therein stated to be on information and belief and as to those matters he believes it to be true.

Anthony Michalski.

Subscribed and sworn to before me this 27th day of August, A. D. 1917.

Albert E. Sherman,

Notary Public, Wayne County, Mich.

My commission expires June 7, 1921.

(e) Decree.

STATE OF MICHIGAN

In the Circuit Court for the County of Wayne — In Chancery

Teofil Banski and	}	No. 60046.
Apolonia Banski,		
Plaintiffs,		
v.		
Anthony Michalski,	}	
Defendant.		

At a session of said court held in the court house at the City of Detroit, on the 3rd day of June, A. D. 1918.

This cause having come on to be heard on the pleadings therein and the proofs taken in said cause and having been argued by counsel for the respective parties, and the court having duly considered the same and being fully advised in the premises.

It is ordered, adjudged and decreed, and the court does hereby order, adjudge and decree, that the assignment of the land contract from Teophil Banski and Apolonia Banski, plaintiffs, to Anthony Michalski, defendant, mentioned in the said bill, and bearing date the 20th day of June, A. D. 1917, of the following described land and premises: Lots numbered thirteen (13) and fourteen (14) of Race & Haass Subdivision of the westerly one-half of the easterly one-half of quarter section 21, 10,000 acre tract, in the Village of Hamtramck, Wayne County, Michigan, and recorded in the office of the Register of Deeds for the County of Wayne in Liber 166 of Deeds, on page 355, be and the same is hereby set aside, vacated and declared null and void as against the said plaintiffs, their heirs and assigns, and that the said defendant, Anthony Michalski has no right, title or interest in and to the said land contract and the premises described therein, by virtue of the said assignment, and that the said defendant, Anthony Michalski, deliver the said contract forthwith to the plaintiff, Theophile Banski.

It appearing from the evidence that the plaintiff, Theophile Banski, has received from the defendant the sum of two hundred ninety (\$290.00) dollars, together with the bill of sale of personal property and an assignment of a land contract for the following described farm property: West one-half of the east one-half of the northwest one-quarter

of section 4 in town north of range 15 east, containing forty (40) acres, more or less, in the township of Casco, St. Clair County, State of Michigan, and the plaintiff, Theophile Banski, having duly tendered the said sum of money and proper re-assignments of said property to the defendant, and the defendant having refused to accept the same, it is ordered adjudged and decreed and the court does hereby order, adjudge and decree, that the plaintiff, Theophile Banski, make and execute to the defendant a proper bill of sale of the personal property received from him, together with an assignment of the land contract for the farm property above described, and that the plaintiff, Theophile Banski, deposit these instruments and the said sum of two hundred ninety (\$290.00) dollars with the clerk of this court for the use and benefit of the said defendant.

And the said plaintiff may have leave to cause this decree, or a certified copy thereof, to be recorded in the office of the Register of Deeds for the said County of Wayne.

And it is further ordered, adjudged and decreed that the said defendant, Anthony Michalski, pay to the plaintiffs or their attorney the costs in this suit to be taxed and the plaintiffs have execution for the same.

Willis B. Perkins,
Circuit Judge.

(A true copy.)

Thos. L. McGoldrick,
Deputy Clerk.

LIAN v. HENRY BRADFORD & CO., 209 Mich. 172—

DECLARATION

(a) Brief Statement of Fact.—This is an action based upon the false and fraudulent representations made by defendants to plaintiffs, concerning the sale of certain real estate. The land contract entered into is not set out in the record in full because the same was lost since the trial. The plaintiffs recovered judgment which was affirmed on appeal.

(b) Declaration.

STATE OF MICHIGAN Supreme Court

Carl L. Lian, And Jensine Lian,	}	Cal. No. 28,896.
Plaintiffs and Appellees,		
v.		
Henry Bradford & Co., a corpora-	}	Error to Newaygo. Hon. Jos. Barton, Trial Judge
tion, and Jesse B. Bradford,		
Defendants and Appellants.		

State of Michigan. In the Circuit Court for the County of Newaygo.
First Count. The plaintiffs say:

1st. That the defendants are residents of the City of Chicago, in the

State of Illinois, and are engaged in the sale of real estate located in the State of Michigan; that the plaintiffs are former residents of the City of Chicago, State of Illinois, but now living and residing in the Village of Newaygo, County of Newaygo, Michigan.

2nd. That on, to-wit, the 10th day of May, 1915, the defendants offered to sell them a certain farm they claimed to be owned by the said defendants, described as the northwest quarter of the northwest quarter of section three, in township eleven north, of range twelve west, and containing forty acres, more or less, according to the government survey thereof.

3rd. That to induce the said plaintiffs to purchase said farm, the said defendants represented to the said plaintiffs that the said farm was located within a radius of three miles from the Village of Newaygo, County of Newaygo, State of Michigan; that the said farm was the best kind of agricultural land and that it would grow and raise all kinds of crops luxuriously and abundantly; that the said farm contained a good and productive virgin soil, underlaid throughout with a clay sub-soil; that the said farm was well suited and adapted to the diversified farming as carried on in western Michigan, and for fruit raising; that there was growing upon said farm sufficient timber for the construction of farm buildings and more than was necessary for fuel; that the said farm was well worth fifty (\$50.00) dollars per acre for farming purposes.

4th. That the plaintiffs were thereby induced to purchase said farm for one thousand (\$1,000.00) dollars, which was then and there paid to the defendants, relying on the truth of the said representations.

5th. That the said representations were not true, and that the said farm was not located within a radius of three miles from the Village of Newaygo, but in truth and in fact the said farm was situated more than six miles from the Village of Newaygo; that the said farm was not the best kind of agricultural land and that it would not grow and raise all kinds of crops luxuriously and abundantly; that the said farm did not contain a good and productive virgin soil, underlaid throughout with clay sub-soil; that the said farm was not well suited and adapted to the diversified farming as carried on in western Michigan and for fruit raising; there was not growing upon said farm sufficient timber for the construction of farm buildings and more than was necessary for fuel; that the said land was not worth fifty (\$50.00) dollars per acre for farming purposes, but, in truth and in fact, was absolutely worthless.

6th. That the said defendants made the said representations fraudulently, knowing them to be false, and for the purpose of inducing the plaintiffs to purchase the said farm.

7th. In the alternative that the defendants, in consideration of the purchase of the same farm by the plaintiffs, warranted that the said land

was within a radius of three miles of the Village of Newaygo; that the said farm was the best kind of agricultural land, and that it would grow and raise all kinds of crops luxuriously and abundantly; that the said farm contained a good and productive virgin soil underlaid throughout with clay sub-soil; that the said farm was well suited and adapted to diversified farming as carried on in western Michigan, and for fruit raising; that there was growing upon said farm sufficient timber for the construction of farm buildings, and more than was necessary for fuel; that the said land was well worth fifty (\$50.00) dollars per acre for farming purposes.

8th. That the said farm was not as warranted, but was situated upwards of six miles from the Village of Newaygo; that the said farm was not the best kind of agricultural land and that it would not grow and raise all kinds of crops luxuriously and abundantly; that the said farm did not contain a good and productive virgin soil, underlaid throughout with clay sub-soil; that the same was not well suited and adapted to diversified farming as carried on in western Michigan and for fruit raising; that there was not growing upon said farm sufficient timber for the construction of farm buildings and more than was necessary for farming purposes.

9th. That because of the said fraudulent representations made as aforesaid by the defendants, the plaintiffs spent and paid out large sums of money, to-wit, one thousand (\$1000.00) dollars paid to the said defendants for said farm; in packing and preparing their household goods and effects, preparatory to shipment, and in payment of freight thereon from the City of Chicago, Illinois, to Newaygo, Michigan, the sum of three hundred (\$300.00) dollars; in the loss of earnings as a result of removal to the State of Michigan, five hundred (\$500.00) dollars.

10. Wherefore the plaintiffs claim a judgment for the sum of three thousand (\$3000.00) dollars.

Second Count. The plaintiffs say:

1st. That heretofore, to-wit, on the 10th day of May, 1915, and for many years prior thereto, the said plaintiffs lived and made their home in the State of Illinois and were unfamiliar and unacquainted with Michigan farm lands and the kind and quality of the soil thereof, and particularly the farming lands in Newaygo County, Michigan.

2nd. That on, to-wit, the 10th day of May, 1915, the said defendants, with intent to cheat and defraud the said plaintiffs and to induce said plaintiffs to purchase of the defendants the northwest quarter of the northwest quarter of section three (3), in township eleven (11) north, of range twelve (12) west, and the said defendants held out and represented to the said plaintiffs that they were the owners thereof; that the said land was within a radius of three (3) miles from the Village of Newaygo; that the said farm was the best kind of agricultural land, that it would grow and raise all kinds of crops luxuriously and abundantly; that the said farm contained a good and productive virgin soil,

underlaid throughout with a clay sub-soil; that the said farm was well suited and adapted to diversified farming as carried on in western Michigan, and for fruit raising; that there was growing upon said farm sufficient timber for the construction of farm buildings and more than was necessary for fuel; that the said farm was well worth fifty (\$50.00) dollars per acre for farming purposes.

3rd. That plaintiffs, because of the circumstances, were compelled to and did rely wholly upon the statement and representation of the said defendants, and thereupon and by means of said false and fraudulent representations of the said defendants, the plaintiffs were induced and persuaded to, and did, on the day and year aforesaid, purchase said farm for one thousand (\$1000.00) dollars, which was then and there paid to the defendants, relying on the truth of the said representation.

4th. That the said representations were not true, but were false and fraudulent; and that the said farm was not located within a radius of three (3) miles from the Village of Newaygo, but, in truth and in fact, the said farm was situated more than six (6) miles from the said Village of Newaygo; that the said farm was not the best kind of agricultural land and that it would not grow and raise all kinds of crops luxuriously and abundantly; that the said farm did not contain a good and productive virgin soil, underlaid throughout with clay sub-soil; that the said farm was not well suited and adapted to diversified farming as carried on in western Michigan, and for fruit raising; that there was not growing upon said farm sufficient timber for the construction of farm buildings and more than was necessary for fuel; that the said land was not worth fifty (\$50.00) dollars per acre for farming purposes, but, in truth and in fact, was absolutely worthless; and that the said plaintiffs, in the purchase and sale of said lands and premises, and the said plaintiffs by means of the premises have been and are greatly injured and damaged in their property.

5th. That the plaintiffs, because of the premises, have been greatly injured and damaged, and they have spent and paid out large sums of money, to-wit, one thousand (\$1000.00) dollars as the purchase price of said farm, three hundred (\$300.00) dollars in packing and preparing their household goods, effects, etc., preparatory to shipment, and in payment of freight thereon, from the City of Chicago, Illinois, to Newaygo, Cichigan; five hundred (\$500.00) dollars in the loss of wages while removing to Michigan.

6th. And the plaintiffs hereby tender a reconveyance of said premises to said defendants and demand that the said defendants reinstate said plaintiffs to their original position and reimburse them for damages they have suffered by reason of the premises hereinbefore mentioned.

7th. The plaintiffs say that according to the provisions of sections 12350 and 12351, of the Michigan Compiled Laws of 1915, the said defendants became and were indebted to the said plaintiffs in the sum of, to-wit, three thousand (\$3000.00) dollars for their damages and

injuries aforesaid, in and about said property and being so indebted, the said defendants afterwards, to-wit, on the day and year aforesaid, in consideration thereof, promised the said plaintiffs to pay them said sum of money on request, yet the said defendants (although often requested) have not paid the said sum of money or any part thereof to the plaintiffs, but have wholly neglected and still do neglect and refuse so to do, to the plaintiffs' damage of three thousand (\$3000.00) dollars, therefore they bring suit.

Wm. J. Branstrom,

Attorney for Plaintiffs.

Business Address:
Fremont, Michigan.

Amendments to Declaration

On November 21, 1918, the court allowed the plaintiffs to amend their declaration in the following particulars:

(a) The ninth paragraph of the first count was amended to read as follows:

9th. That because of the said fraudulent representations, made as aforesaid by the defendants, the plaintiffs were led to believe that the said premises so purchased by them were worth upwards of \$2000.00, where, in truth and in fact, the said premises were worthless, and to that extent they have been damaged in the sum of \$2000.00.

(b) The fifth paragraph of the second count was amended to read as follows:

5th. That the plaintiffs, because of the premises have been greatly injured and damaged to the extent of \$2000.00.

(c) The second count of the declaration was further amended by striking out the sixth paragraph thereof.

(c) Amended Plea and Notice.

STATE OF MICHIGAN

In the Circuit Court for the County of Newaygo

Carl L. Lian, And Jensine Lian,	}	Plaintiffs,
		v.
Henry Bradford & Company, a corporation; Henry Bradford & Company, a copartnership, consisting of Jesse B. Bradford and Henry Bradford, and Jesse B. Bradford,	}	Defendants.

The defendants, Henry Bradford & Company, a corporation, and Jesse B. Bradford, come and demand a trial of the matters set forth in the plaintiffs' declaration.

To the above named plaintiffs: You will please take notice that the defendants, Henry Bradford & Company, a corporation, and Jesse B. Bradford, will show in their defense under the plea of the general issue that the plaintiffs purchased the land described in declaration

about the year 1910 from Henry Bradford, doing business as Henry Bradford & Company, on a land contract, and from the time of such purchase, said plaintiffs made monthly payments on said contract as were stipulated therein to Henry Bradford for a time, and later to Henry Bradford & Company, a corporation, until, to-wit, 1915, at which time said plaintiffs paid the balance of said contract price and secured a deed of the land from the defendant, Jesse B. Bradford, who held the legal title of the land at said time. That said plaintiffs never made any claim of fraudulent representations on the part of these defendants, or either of them, until April, 1918, although said plaintiffs, during all the time aforesaid, well knew or should have known the truth or falsity of said alleged fraudulent representations, and these defendants will insist that if said plaintiffs ever had any grounds for such a claim, they are guilty of laches which now preclude them from maintaining such a claim in this suit.

Cross, Foote & Sessions,
Attorneys for Defendants.
Henry Bradford & Co., and
Jesse B. Bradford.

(f) Authorities Relied Upon by Plaintiff—Brief for Plaintiff.—Plaintiff made a tender to defendant a few days after the transactions, which defendant refused to accept and the case of *Merrill v. Wilson*, 66 Mich. 243, which defendant submits in support of his contention that plaintiffs are not entitled to a cancellation of their assignment because they cannot place the defendant in statu quo, is to be distinguished from this case. In the *Merrill* case the plaintiff had waited a long time before bringing suit and had affirmed the contract by bringing suit against the defendant for money due under the agreement.

The case of *Scandin v. Sherwood*, 67 Mich. 230, bears a striking resemblance in facts to the case at bar. The parties in that case exchanged their farms on the representations of the defendant that he owned in fee and had a good title to the land; that it was not encumbered except by a \$1300 mortgage and was worth \$2800. Defendant in addition to his farm paid complainants \$200.00 in money. In granting relief to complainants the court uses the following language (p. 231):

"The testimony contained in the record before us proves that the foregoing representations as to title and value were false in all material particulars and complainants have received substantially nothing for their house and lot. The land was not worth the amount of the mortgage.* * * We think complainant ought not be compelled to litigate the title whether it should turn out to be good or bad. They were entitled to have a marketable title to the land in their own name at the time the bargain was closed. They did not bargain for a lawsuit but for a clear title and not having obtained one are entitled to have the bargain rescinded upon repaying the \$200.00, and tender of a quitclaim deed for complainants, and surrender of possession of the farm."

All the elements constituting fraud have been established and the trial judge had the opportunity to see and hear witnesses and to form a proper estimate of the character and value of the testimony.

The defendant attempted to show that the complainant saw and examined the farm before entering into the transaction and that no deception was practiced. In this connection the case of Starkweather v. Benjamin, 32 Mich. 305, is in point. This was an action for damages arising from alleged misrepresentation made by Starkweather to Benjamin, concerning the quantity of land in a parcel purchased from Starkweather and others for whom he acted, and which was bought by the acre. The defense rested mainly on the ground that the purchaser saw the land, and was as able to judge of its size as Starkweather.

Justice Campbell in his opinion states (p. 306): "We do not think the doctrine that where both parties have equal means of judging there is no fraud applies to such a case. The maxim is equally valid, that one who dissuades another from inquiry and deceives him to his prejudice is responsible." The statements in this opinion can be very properly applied to the facts in the case at bar. "By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge though they are not exclusively so, and although the party to whom the representations are made may have an opportunity of ascertaining the truth for himself." Am. & Eng. Enc., Vol. 14, p. 120 (2nd ed.). Citing: *Picard v. McCormick*, 11 Mich. 68; *Eaton v. Winnie*, 20 Mich. 156; *Kost v. Bender*, 25 Mich. 515; *Jackson v. Collins*, 39 Mich. 558; *Nowlin v. Snow*, 40 Mich. 699; *Jackson v. Armstrong*, 50 Mich. 65.

In a recent case, *Bunting v. Creglow* (N. D.), 168 N. W. Rep. 731, presenting strikingly similar facts to the case at bar, the court in decreeing a rescission of the contract for an exchange of a tract of land, on the ground of defendant fraud, uses the following language: "The case is too plain. When it appears that a party has made a contract which no person of common sense would make if correctly informed, the fair presumption is that he was induced to make such a contract by fraud and misrepresentation. The plaintiff has fully complied with all the conditions necessary to a rescission of the deal. Really it does seem that counsel should know better than to appeal such a case as this."

(g) Authorities Relied Upon by Defendant—Brief for Defendant.—Fraud, sufficient to cancel an instrument, as is sought to be done in this case, namely, the assignment of the plaintiffs' land contract to the defendant, must be clearly and plainly proven and relief will not be granted unless the falsity of the alleged false representations is certainly proven and unless the plaintiffs have been deceived and injured

by them. Such is the rule laid down in the case of *Oliver v. Baldwin*, 201 Mich. 362, where this court, quoting with approval from the opinion rendered in the case of *Atlantic Delaine Company v. James*, 94 U. S. 207, 214, used the following language: "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

It has also been held by this court to be elementary that fraud is not to be lightly presumed but must be firmly established by proof. *A. E. Wood & Company v. Drug Store*, 192, Mich. 456.

BARNHARDT v. HAMEL, 207 Mich. 232—

- (a) Brief Statement of Fact.
- (b) Declaration.
- (c) Plea.
- (d) Authorities Cited by Defendants—Brief of Defendants.
- (e) Authorities Cited by Plaintiffs—Brief of Plaintiffs.

BARNHARDT v. HAMEL, 207 Mich. 232—

(a) This is an action brought to recover money paid to defendants for the sale of certain farm land, on the ground that defendants falsely represented the quality of the land, its location, and value. The plaintiffs recovered judgment which was affirmed on appeal.

(b) Declaration.—State of Michigan, The Circuit Court for the County of Manistee.

Elizabeth Barnhardt and her husband, Peter Barnhardt of Manistee County, State aforesaid, plaintiffs herein, by their attorney, H. F. Hittle, complain of Adolf Kann and Adolf Hammel, a copartnership, doing business as Adolf Kann & Co., in Manistee county, state aforesaid, defendants herein, in a plea of assumpsit, filing their declaration as commencement of suit in accordance with the statute authorizing the commencement of suit by declaration.

1. For that whereas: Heretofore, to-wit, on the first day of April, 1915, the said plaintiffs were the owners of, and had a legal interest in and to certain lands located in, and were residents of the County of Allen, State of Indiana, and at the time aforesaid the said defendants were engaged in the business of buying and selling real estate for profit in said county and vicinity. That, to-wit, during the month of April, 1915, while the said plaintiffs were the owners of the land above mentioned and herein described as follows, to-wit: The west ten acres of the north half of the northeast quarter of section eleven, township twenty-nine north, range thirteen east, also the east half of the north half of the west half of the west half of the northeast quarter of section eleven, township twenty-nine north, range thirteen east. Excepting therefrom one-fourth acre, all located in the County of Allen, State of Indiana.

2. That said defendants, by and through their agent, J. W. Long, did falsely and fraudulently represent to the said plaintiffs with the intent to defraud and deceive them.

3. That the defendants had a certain farm in the County of Manistee, State of Michigan, that he, the said J. W. Long, would like to sell to the said plaintiffs for farming purposes.

4. That the said farm was suitable for farming purposes.

5. That all kinds of crops could be raised on the said farm successfully.

6. That said farm would produce just as good crops as the land the said plaintiffs then owned in the State of Indiana.

7. That the said farm was worth just as much per acre as the land the said plaintiffs then owned in the State of Indiana.

8. That the said land had a sand loam and a clay sub-soil.

9. That the said farm was just a short distance from a German Lutheran School.

10. All of which representations were false and fraudulent in every respect, in that the said J. W. Long, the agent of the said defendants, well knew.

11. That the said farm was not all suitable for farming purposes.

12. That the said farm would not produce corn, wheat, oats, hay and rye successfully.

13. That the said farm would not produce as good crops as the farm the said plaintiff owned in the State of Indiana.

14. That the said farm was worth not more than \$25.00 per acre.

15. That the said farm was not a sand loam with a clay sub-soil, but a light sand with no sub-soil.

16. That the said farm was about five miles from the German Lutheran School.

17. That the said J. W. Long, the agent of the said defendants at the time of making the aforesaid false and fraudulent representations to the said plaintiffs, well knew that they were false and untrue in every respect, and that they were made by the said J. W. Long with the intent to defraud the said plaintiffs. That thereafter the said plaintiff, Peter Barnhardt, believing the aforesaid false and fraudulent representations of the said J. W. Long as the truth and acting upon them as the truth, did, at the express request of the said J. W. Long, come to the County of Manistee, State of Michigan, on or about the first of April, 1915, for the purpose of looking at the said farm.

18. That while the said Peter Barnhardt was in the County of Manistee, state aforesaid, for the purpose of looking at the said farm hereinabove mentioned and hereinafter described as follows, to-wit:

The south half of the southwest quarter and the southwest quarter of the southeast quarter of section twenty-five, township twenty-four north, range sixteen west, in the County of Manistee, State of Michigan; said defendants did falsely and fraudulently represent to the said Peter Barnhardt with the intent to deceive and defraud him.

19. That the said farm would produce just as good crops as the said plaintiffs then owned in the State of Indiana.

20. That the said farm was worth \$50.00 per acre.

21. That the low swamp land on the back end of the farm could be drained, that the said land, after being drained, would be more valuable for farming purposes than the remainder of the farm.

22. That the said land would produce good crops of hay, oats, corn, beans, potatoes and rye.

23. That the said land was just as good as he could find in this part of the state.

24. That the said farm was a sand loam with clay sub-soil.

25. That the said farm was two and one-half miles from the German Lutheran Church.

26. That the crops from the farm would pay the mortgage in four years.

27. All of which representations were false and untrue in every respect, in that the defendants well knew that the said farm would not produce as good crops as the farm the plaintiffs then owned in the State of Indiana.

28. That the high land was worth no more than \$25.00 per acre and that the low swamp was worthless.

29. That the low swamp land on the back end of the farm was worthless for farming purposes and could not be drained.

30. That the land had been run down and was worn out and would not produce good crops of hay, oats, corn, beans, potatoes or rye.

31. That the land was not as good as could be found in this part of the state but, on the contrary, that it was about as poor as could be found.

32. That the said farm was not a sand loam with a clay sub-soil, but was a light sand with no sub-soil.

33. That the said farm was about five miles from the German Church.

34. That the crops would be very small and no more than enough to provide for the plaintiff's family.

35. That the said J. W. Long and the said defendants at the time of making the aforesaid false and fraudulent representations well knew that they were false and untrue in every respect and were made by the said J. W. Long, the agent of the said defendants, and the said defendants with the intent to deceive and defraud the plaintiffs herein.

36. That the said plaintiffs desiring to purchase a farm for farming purpose and having never been in this section of Michigan, and having no knowledge of the value and quality of Michigan lands or no knowledge of the falsity and untruthfulness of the foregoing false and fraudulent representations, but on the contrary believing them to be true, and acting upon them as the truth, did, on or about the 18th day of April, 1915, enter into a contract with said defendants to buy from them the land above described for the sum of \$6,000.00 and to pay for the said land by conveying to the said defendants, their farm in the County of

Allen, State of Indiana, for the sum of \$3,500.00 and further consideration in the form of a mortgage for the sum of \$2,500.00 on the farm the said plaintiffs were buying from the said defendants, whereupon it was agreed that the said defendants were to convey to the plaintiffs, by a good and sufficient warranty deed, the said farm last herein described. That in accordance with the provisions of the said contract, the said plaintiffs did on the 7th day of July, 1915, convey and warrant to the said defendants their farm in the County of Allen, State of Indiana, and did further execute and deliver to the said defendants a mortgage on the farm, the said defendants were selling to the said plaintiffs, but that the said defendant did not nor had not conveyed to the said plaintiffs the said farm as agreed and as hereinabove mentioned.

37. That the said plaintiffs believed the aforesaid false and fraudulent representations of the said agents of the said defendants, and the said defendants as the truth and acted upon them as the truth, and by reason of the foregoing fraudulent conduct of the said defendants and their agents in the making of the aforesaid false and fraudulent representations with the intent to defraud and deceive the said plaintiffs, they, the said plaintiffs have sustained great damage, to-wit, \$5000.00, said amount being the difference between the actual value of the farm the said defendants sold to the said plaintiffs and the value the same farm would have been worth had it answered to the representations of the said defendant, for which amount the said plaintiffs have been damaged by reason of the foregoing false and fraudulent representations of the said defendants and their agent, whereby a right of action has accrued to the said plaintiffs and the said plaintiffs do hereby claim all right and benefit they may have to bring and maintain this action under and by virtue of Section 10421 of the Compiled Laws of 1897 of the State of Michigan, by virtue of which law promise has been made and is implied on the part of the said defendants, to pay to the said plaintiffs their just damage arising from the aforesaid fraud and deceit, whereby the said defendants on or about the 18th day of April, 1915, became indebted to the said plaintiffs in the sum of \$500.00. That the said money, nor any part thereof has not been paid to the said plaintiffs although having been requested so to do and therefore they bring suit.

1. For that whereas, the said defendants, on or about the 18th day of April, 1915, became indebted to the said plaintiffs in the County of Manistee, State of Michigan, in the sum of \$5000.00 for the money then and there received by the said defendant for the use of the said plaintiff.

And whereas, the said defendants being so indebted, afterwards, on, to-wit, the day and date last aforesaid, in consideration of the premises, promised the said plaintiffs to pay them the several sums of money, when they, the said plaintiffs, should hereunto afterwards request the said defendants so to do. Nevertheless, the said defendants, though often afterwards requested to do so, have not as yet paid the several sums of money above mentioned, or any part thereof, but have hitherto,

wholly refused, and still refuse so to do. To the plaintiffs damage in the sum of \$5,000.00 and therefore they bring this suit, etc.

Dated this 15th day of January, 1917.

H. P. Hittle,

Attorney for Plaintiff.

(c) Plea and Notice.—To the above named plaintiffs:

Now comes Adolph Kann and Adolph Hammell, the defendants in the above entitled cause, and demand a trial of the matters set forth in the declaration of the plaintiffs, filed therein.

Dated February 14, 1917.

Thomas Smurthwaite,

Attorney for Defendants.

Business Address:

Manistee, Michigan.

To the above named plaintiffs: Please take notice, that upon the trial of said cause the defendants will give in evidence and insist under the general issue above pleaded, that, at the time the agreement for the exchange of lands set forth in the declaration of the plaintiffs was made, the defendants had not by themselves or any agent for them, seen the land then owned by the plaintiffs in Allen County, Indiana, described in said declaration and had never seen the record of title to said lands and knew nothing whatever as to the condition of the title to said lands, or of the location or value of said lands, and at that time had no agent whatever in the vicinity of said lands of whom inquiry could be made by them as to the location, condition, or value of said lands, or the condition of the title thereto.

That the plaintiff, Peter Barnhardt, representing or claiming to represent himself and the plaintiff Elizabeth Barnhardt, in order to induce the said defendants to make the exchange of lands set forth in said declaration, did wilfully and falsely represent and claim to the said defendants:

1. That the said lands of the plaintiffs in Allen County, Indiana, described in said declaration, as aforesaid, were well located and were dry lands of excellent soil and in an excellent condition of cultivation and that the buildings thereon were in excellent condition.

2. That the said lands were well worth in cash the sum of thirty-five hundred (\$3500.00) dollars, and

3. That they were subject to a mortgage of fifteen hundred (\$1500.00) dollars only, upon which all accrued interest was paid, and that there was no other mortgage or further claim or lien upon or against the said lands for taxes, interest, or any other things, over and above the said mortgage for fifteen hundred (\$1500.00) dollars.

That the defendants, believing the said presentations of the plaintiff to be true, were induced thereby to enter into a contract for the exchange of said properties or for the purchase by them of the said lands of the plaintiffs and the sale by them to the plaintiffs of the said lands, then

belonging to the said defendants in Manistee County, Michigan, described in the said declaration.

That the said statements of the plaintiffs so made to the defendants were false and fraudulent, as the plaintiffs well knew, in that the said lands of the plaintiffs were not well located, were not dry lands, were not excellent soil, were not in a good condition of cultivation, and the buildings thereon were not in excellent condition.

That the said lands were not worth in cash the sum of thirty-five hundred (\$3500.00) dollars, and were not worth in cash at that time more than twenty-eight hundred (\$2800.00) dollars and were not worth to the said defendants more than twenty-five hundred (\$2500.00) dollars.

That the said lands were in truth and in fact subject to one mortgage of fifteen hundred (\$1500.00) dollars and some accrued interest thereon; to a second mortgage of three hundred (\$300.00) dollars and accrued interest thereon to the amount of fifty-one and 31/100 (\$51.31) dollars and to a lien for taxes to the extent of about forty (\$40.00) dollars.

That the defendants, believing the said statements and representations of the plaintiffs to be true, did at the City of Manistee, Michigan, authorize one John W. Long, who was then and there present, to make and execute a land contract for and in behalf of the defendants to the plaintiffs for the sale of the said lands of the defendants to the plaintiffs, upon receiving from the plaintiff, a good and sufficient warranty conveying to the said Adolph Kann for the defendants the said lands of the plaintiffs, and to allow the said plaintiffs the said sum of thirty-five hundred (\$3500.00) dollars for their said lands less the amount of the mortgage upon the same for fifteen hundred (\$1500.00) dollars, as represented by the plaintiffs.

That on, to-wit, the 20th day of April, the said John W. Long, acting for the said defendants, as aforesaid, and the plaintiffs did make and execute a land contract in the following words and figures:

This agreement entered into by and between A. Kann & Co., of Manistee, Michigan, as party of the first part and Elizabeth Barnhardt and Peter Barnhardt of Monroeville, Ind., as party of the second part.

Witnesseth: That the party of the first part has this day bargained and sold and hereby agrees to convey to party of the second part by good and sufficient warranty deed, signed by the member or members of this firm, holding the record title thereto, their wives joining in said deed, the following described real estate in Manistee County, State of Michigan:

S. E. ½ of S. E. ½ of S. W. ¼, and the S. W. ¼ of S. E. ¼ of Sec. 25-24-16.

It is hereby agreed that said party of the second part is to pay to said party of the first part as purchase price of said real estate, the sum of six thousand (\$6000.00) dollars, payable as follows: Twenty hundred cash and four thousand payable in five years from March 1, 1915, at 6 per cent. interest from date.

The crops growing on the premises are reserved, and the conveyance shall be made subject to the present tenant's rights under lease.

Possession to be given on or before March 1, 1915, deed to be made and abstract delivered at Monroeville, R. No. 4, on or before October 1, 1914.

It is mutually agreed, by and between the parties hereto that the time of performance shall be the essence of this contract and in case of the failure of the party of the second part to carry out the stipulation and agreements upon his part to be performed at the time and in the manner hereinafter stated, then this contract shall become null and void at the option of said first party, and all sums paid hereunder by the party of the second part on the contract shall be by him forfeited and such payments shall be retained by said first party in full satisfaction and in liquidation of all damages by him sustained; or specific performance of this contract may be demanded at the option of the first party.

The party of the first part shall furnish an abstract of title which shall, after examination, be returned to it and held by it until all notes are paid. Should such an abstract not show good title in fee simple according to the laws of the states where said land is situated, then first party agrees within reasonable time to make such abstract show such title, either by creditable affidavits or when necessary by suit, all at its own expense. This contract contains all the agreements between the parties hereto.

Received on this contract, the sum of two thousand dollars (\$2000.00) this 20th day of April, 1914.

A. Kann & Co.,

Per Jno. W. Long.

In witness whereof, the said parties have hereunto set their hands this 20th day of April, 1914.

(Signed) Peter Barnhardt,

(Signed) Elizabeth Barnhardt,

(Signed) A. Kann & Co.,

Per Jno. W. Long.

That the said John W. Long, by mistake, did not describe the lands of the defendant correctly in said contract, they being correctly described in the declaration of the plaintiffs.

That said mistake in describing the said lands, was mutual between the said Long and the plaintiffs, and the defendants on the hearing of this cause, will ask the said court, on the chancery side thereof, to correct the said mutual mistake and said contract by correcting and writing therein the correct description of said lands, as the same are described in said declaration.

That the defendants were induced to authorize the making of said land contract, solely through and by reason of the false and fraudulent representations aforesaid, by which they were misled and deceived, as aforesaid.

Whereby, the defendants were damaged and injured in large sums of money, namely:

By the false and fraudulent representation of the plaintiffs as to the value of their said lands in Indiana.....	\$ 700.00
By the excess of mortgages, interest and taxes over and above the amount represented and claimed by plaintiffs.....	400.00
Total.....	<u>\$1100.00</u>

which amount with interest the defendants will recoup against the plaintiffs and will demand judgment against the plaintiff therefor, or that the same be set off against any claim the plaintiff may prove upon the trial of this cause against the defendants, and that judgment be rendered and entered in favor of the defendants and against the plaintiffs for the balance thereof.

Please take further notice that upon the trial of this cause the defendants will, under the general issue above pleaded, give in evidence, and insist that the plaintiffs, on the first day of January, 1917, were and now are, indebted to the defendants for moneys had and received by the plaintiffs to and for the use of the defendants in the sum of eight hundred (\$800.00) dollars.

And in a like sum for moneys loaned by the defendants to the plaintiffs, at their request.

And in a like sum for moneys before then paid by the defendants to and for the use of the plaintiffs at their request.

And in a like sum for goods, wares and merchandise before then sold by the defendants to the plaintiffs, at their request; which said indebtedness is represented as follows:

By a promissory note to the defendants or to one of them for both as co-partners dated July 25, 1915, in the sum of.....	\$351.31
One like note dated February 25, 1916, for.....	129.50
One like note dated June 10, 1916, for.....	25.00
And 31½ bushels of rye at \$1.25 per bushel, sold and delivered by the defendants to the plaintiffs in Sept., 1916.....	39.38
Total.....	<u>\$545.19</u>

with interest as provided in said notes and by law, all of which the defendants will set off against any claim the plaintiffs may establish against them on the trial of this cause and will demand judgment against the plaintiffs for the balance thereof.

Please take further notice: That upon the trial of said cause the defendants will give in evidence and insist upon the general issue above pleaded, that the plaintiffs in this cause, if they ever had any claim, whatsoever, against the defendants on account of the matters alleged in the said declaration, they, the said defendants, have waived the same by acquiescing in the said dealings and said contracts or agreements for a period of nearly three years without any objection whatever to the defendants, or any demands for the rescission of said

contracts or agreements of for compensation for any loss or damage, now in said declaration claimed by them, which is and was the first notice of any kind received by the defendants from the plaintiffs of any dissatisfaction on their part or of any loss or damage suffered by them or of any claimed false or fraudulent representations made to them by any person concerning the lands, they, the said plaintiffs agreed to purchase in and by the said land contract.

That in the meantime and during all the period since the execution of said land contract, the said plaintiffs, being in possession of said lands and having full knowledge of all matters alleged in said declaration, have dealt with the said defendants in matters concerning the said lands and in other matters relating thereto, in a manner wholly inconsistent with the claims made in said declaration against the defendants, whereby, the said plaintiffs have wholly waived the said claims, if any such claims ever existed, and are now wholly estopped in law from asserting said claims, or either or any of them, against the defendants, in this or any other action at law or in chancery.

Please take further notice, that upon the trial of this cause, under the plea of the general issue above pleaded, the defendants will give in evidence and insist that the plaintiffs have not such interest in the lands, so agreed to be purchased by them from the defendants, as entitles them to maintain this action, inasmuch as the defendants have received from the lands conveyed by the plaintiffs to them, the full value thereof, which in excess of the two mortgages upon said lands, as aforesaid was ten hundred and seventy (\$1070.00) dollars, said lands being worth much less than was represented by the plaintiffs as hereinabove stated, and the said plaintiffs have, since said agreement was made, borrowd, had and received from the defendants the sum of six hundred and nineteen and 49/100 (\$619.49) dollars as aforesaid, and have had and enjoyed the use and occupation of the said lands, they agreed to purchase from the defendants as aforesaid, and have had other benefits and advantages worth in all more than the entire interest of the plaintiffs in said lands for all of which moneys, use and occupation, benefits and advantages, the defendants have no security whatsoever, and in addition thereto, the said plaintiffs have borrowed, had and received from the defendants, the further sum of three hundred and seventy-five (\$375.00) dollars for the payment of which the defendants hold partial security under chattel mortgage.

Wherefore, the said plaintiffs have no money or property interest whatever in said lands and premises, and do not have, hold and maintain such an interest in said lands as will entitle or authorize them to maintain this suit as aforesaid.

Dated this 14th day of February, 1917.

Thomas Smurthwaite,
Attorney for Defendants.

Business Address:
Maristee, Michigan.

(d) Authorities Cited by Defendants—Brief of Defendants.—It is contended by the defendants that the agency of Mr. Long was special and his powers were to close the contract only, and not authorized to make any representations as to the land. In *Iowa R. Land Co. v. Tehring*, 126 Iowa 1, 101 N. W. 120, the averment as to agency was that he "was agent for the sale of their lands in Greene County, Iowa," and this was held to be insufficient to authorize proofs as to false representations or to bind the alleged principal thereby. The following cases are cited as upholding this principle of law: *Kornemann v. Monahan*, 24 Mich. 36; *Grover & Baker v. S. M. Co. V. Polhemus*, 34 Mich. 247; *Hirshfield v. Waldron*, 54 Mich. 649; *Bond v. Pontiac & Pt. Austin R. R. Co.*, 62 Mich. 643-649; *Bonnazza v. Joseph Schlitz Br. Co.*, 155 Mich. 36; *Michigan Lumber Yard v. Blesch*, 166 Mich. 470; *Gutterson v. Dilley, et al.* (Mich.), 167 N. W. 865.

In regard to ratification of the agent's acts, by receiving and acting upon the contract he was expressly authorized to make, it is the contention of defendants that a ratification is necessary only when an agent acts without authority, 31 Cyc. 1246, and has been applied and enforced in the following cases: *Hurley v. Watson*, 68 Mich. 531; *Deffenbaugh v. Paper Mfg. Co.*, 120 Mich. 242; *Upton v. Dennis*, 133 Mich. 238; *Brown v. Foster*, 137 Mich. 35; *Cowan v. Sargent Mfg. Co.*, 141 Mich. 87; *Pittsburgh & Ohio Coal Co. v. Scully*, 145 Mich. 229.

The court admitted alleged misrepresentations as to the crops the plaintiffs could raise upon the farm, upon the authority of *Yanelli v. Littlejohn*, 172 Mich. 91. Defendants contend that that case is not applicable to this case for the reason that in that case, the plaintiff was of foreign birth and had not been a farmer, while in this case plaintiff had been a farmer all his life. In *Draft v. Hesselsweet*, 194 Mich. 604, the purchaser was not a farmer and he claimed that the vendor or his agent represented "that the fruit on the farm would pay for it in the first year," and this court said that this "ground of complaint was not a representation of a present existing fact, and therefore must be regarded as a matter of opinion."

The same rule was applied in *Dieterle v. Ann Arbor Paint Co.*, 143 Mich. 416; *Getchell v. Dusenberg*, 145 Mich. 197.

The plaintiff introduced in evidence, over the objection of defendant, a picture of what purported to be the farm, claimed to have been shown by defendant to plaintiff, defendant contending that the picture had never been seen by plaintiff before the trial.

"A purchaser cannot avail himself of representations in a circular, the contents of which were not known to him." 35 Cyc. 386; *Landman v. Bloomer*, 117 Ala. 312; 23 So. 75.

The plaintiffs affirmed the contract and demand damages for the alleged fraud, according to their counsel, while the plaintiffs by words and acts say, "we abandon the contract and the farm, we refuse to pay the mortgage." There cannot be both an abandonment of the contract

and an affirmance thereof. If a party abandons it, his remedy is suit for rescission, he cannot rescind and affirm. 39 Cyc. 2000; *Lowrie v. Gourlay*, 112 Mich. 641.

The plaintiff lived on the farm and worked it for two seasons before bringing this suit. Defendants contend this was a waiver and cite 20 Cyc. 92: "If the defrauded party acquires knowledge of the fraud while the contract remains executory, and thereafter does any act in performance or affirmance of the contract, or exact performance from the other party, he thereby condones the fraud and waives his right of action." *Craig v. Bradley*, 26 Mich. 353; *Wylie v. Gamble*, 95 Mich. 564; *Merrill v. Wilson*, 66 Mich. 232; *Daily v. King*, 79 Mich. 568; *Parkyn v. Ford*, 194 Mich. 184.

"Parties claiming to have been defrauded must show some diligence in their own behalf and must move promptly upon discovery of the fraud." *Campau v. Lafferty*, 50 Mich. 114.

Where the plaintiff examines the land before purchase no recovery can be had. *Buxton v. Jones*, 120 Mich. 522; *Ransier v. Dwyer*, 149 Mich. 487.

(e) *Authorities Cited by Plaintiff—Brief for Plaintiff.*—The authority of an agent to act for a principal is not determined solely by the principal's oral declarations as a witness as to the nature and extent of the agent's powers, but is also determined from the situation of the parties, their course of dealing, and by what was actually done.

2 C. J. (218, 576). A purchase of property by an agent with or without authority, is ordinarily ratified by the principal accepting and retaining the benefits of such purchase and also including the fraud and representations of the agent in the transaction as inducement to the purchase or acquisition. *Walling v. Paulsen*, 160 Mich. 392.

The admissibility of evidence in regard to the crops was not error, the difficulty was with the soil, not the elements.

"Bearing in mind that the declaration alleges that the land had been sold to plaintiff as good farming land, and that it would grow the numerous crops stated, the plaintiff sought to show the extent of the labor and effort made to produce crops, that enough could not be raised to support the family, and the necessity of going elsewhere to work, and the fact that the family had to be assisted by others. We think that whether the plaintiff was able to live on the place, and the amount that could be produced there, were material questions, as well as the efforts made by the plaintiff and family in that direction. While some of the testimony here complained of was rather remote and might have been properly excluded, we do not think that its reception constituted reversible error." *Yarnell v. Littlejohn*, 172 Mich. 98, 99; *Wegner v. Herkimer*, 167 Mich. 587, 594.

It is no defense to an action for fraudulent representations made in the sale or exchange of land that the party defrauded may have seen and examined the lands. *Starkweather v. Benjamin*, 32 Mich. 305. Espe-

cially where the defrauded party is a stranger and is ignorant of real estate values in the vicinity where the lands are located. *Stoney Creek Woolen Co. v. Swalley*, 111 Mich. 321.

It is not necessary that the plaintiff repudiate the contract and bring his action for the fraud immediately upon discovering the false representations. The action at law does not depend upon the parties being placed in statu quo, and no special diligence is required of him in discovering the fraud or in presenting his action. *Dayton v. Monroe*, 47 Mich. 194; *Wegner v. Herkimer*, 167 Mich. 587, 593; *Smith v. McDonald*, 139 Mich. 225; *Smith v. Werkheiser*, 152 Mich. 177, 180; *Yarnelli v. Littlejohn*, 172 Mich. 91, 104; *Hutchinson v. Westbrook*, 191 Mich. 484, 488.

And in all contraversies not within the statute, waiver, if relied on, is a question of fact and not of law. *Dayton v. Monroe*, 47 Mich. 195; *Wegner v. Herkimer*, 167 Mich. 587.

CHAPTER XIV
REAL ESTATE BROKERS
STATUTORY PROVISIONS
LICENSING RIGHTS, DUTIES, LIABILITIES
MISCELLANEOUS

§ 237. Definition.

§ 238. Regulation and Licensing.

§ 239. Form of Application for License for Real Estate Broker.

§ 240. Form of Application for License for Business Chance Broker.

§ 241. Form of Application for License for Real Estate Salesman.

§ 242. Commission Agreement.

§ 243. The Decisions on the Duty of the Broker.

§ 244. When Commission Earned.

§ 237. **Real Estate Brokers.—Definition.**—A real estate broker has been defined in Michigan by statute to be any person, firm, partnership, association, co-partnership or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease or rents or offers for rent any real estate or the improvements thereon for others, as a whole or partial vocation.¹ The same Act defines a real estate salesman to be any person employed by a licensed real estate broker for the purposes above mentioned. It also defines a business chance broker to be any person, firm, partnership, association, co-partnership or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others as a whole or a partial vocation.

§ 238. **Regulation and Licensing.**—In 1919 an Act was passed in Michigan providing for the licensing of real estate brokers and salesman,² and as amended in 1921, makes it compulsory for any person, firm, partnership, association, co-

1. Public Acts, Mich. 1921, No. 387, Sec. 2.

2. Public Acts, Mich. 1919, No. 306.

partnership or corporation doing business as a chance broker, real estate broker or real estate salesman to first obtain a license.³

The Act does not apply to any person who is the owner of the real estate, or to any person holding a power of attorney from the owner for the purposes above mentioned, or to include the services in any way rendered by an attorney at law in the performance of his duties as such attorney at law, or to any receiver, trustee in bankruptcy, administrator or executor, or person selling under order of court.⁴

An application for license must be made in writing to the Michigan Securities Commission at Lansing, Michigan, on forms prepared by the Commission, as follows:

§ 239. Application for License for Real Estate Broker.—

MICHIGAN SECURITIES COMMISSION

(Department of Real Estate.)

To the Michigan Securities Commission, Lansing, Michigan:

In compliance with Act No. 306 of the Public Acts of 1919, I (we).....

hereby make application for a license authorizing me (us) to transact the business of a REAL ESTATE BROKER in compliance with the law regulating and licensing such business within the State of Michigan, and tender the FEE of \$10.00 HERewith.

1. Name of applicant.....

(If firm, give names of members; if partnership, give names of partners; if co-partnership, association or corporation, give officers.)

2. Business address (street and number).....

(City or town).....

(If more than one office, give address of each).....

3. Residence (street and number).....

(City or town).....

4. If a firm, partnership or corporation designate ONE MEMBER of said firm, partnership or corporation to receive salesman's card under the license.....

3. Public Acts, Mich. 1921, No. 387.

4. Public Acts, Mich. 1921, No. 387, Sec. 2.

5. What has been your business or occupation for past five years? Give places where continuous for sixty days or more

6. Give references other than endorsers for each place stated in question five.....

7. Were you licensed as a Real Estate Salesman in 1920?

8. Have you been in any litigation over real estate during the past year?.....

State nature of complaint.....

Signed (applicant).....

(If applicant is firm or partnership, signer must give his relation to firm or partnership; if corporation, application must be signed by proper officers.)

Sworn to and subscribed before me a notary public in and for the county of..... State of Michigan, this..... day of....., 192.....

(Seal)

My commission expires.....

RECOMMENDATION

(Two endorsers required.)

We, the undersigned, who are, and have been for a period of a year past, owners of real estate in the county of....., Michigan, do respectfully recommend for your consideration the application of..... for a license as a Real Estate Broker.

We do hereby certify that we are well acquainted with the applicant(s) and also certify that he (they) has (have) a good reputation for honesty, integrity and fair dealing, and that we are satisfied that he (they) is (are) worthy of the license for which he (they) applies (apply).

Name

Address

Name

Address

§ 240. Application for License for Business Chance Broker.

MICHIGAN SECURITIES COMMISSION

(Department of Real Estate.)

To the Michigan Securities Commission, Lansing, Michigan:

In compliance with Act No. 306 of the Public Acts of 1919, I (we)..... hereby make application for a license authorizing me (us) to transact the business of a Business Chance Broker for 1921 in compliance with the law regulating and licensing such business within the State of Michigan, and tender the FEE of \$10.00 herewith.

1. Name of applicant.....

(If firm, give names of members; if partnership, give names of partners; if co-partnership, association or corporation, give officers.)

2. Business address (street and number).....

(City or town)

(If more than one office, give address of those other than main one here.)

3. Residence (street and number).....

(City or town).....

4. If a firm, partnership or corporation designate member of said firm, partnership or corporation to receive salesman's card under the license.....

5. What has been your business or occupation for the past five years? Give places where continuous for sixty days or more

6. Give reference other than endorsers for each place stated in question five.....

7. Have you been in any litigation over real estate during the past year?.....

State nature of complaint.....

Signed (applicant).....

(If applicant is firm or partnership, signer must give his relation to firm or partnership; if corporation, application must be signed by proper officers.)

Sworn to and subscribed before me, a notary public in and for the county of....., State of Michigan, this..... day of....., 192.....

(Seal)

My commission expires.....

RECOMMENDATION

(Two endorsers required.)

We, the undersigned, who are, and have been for a period of a year past, owners of real estate in the county of....., Michigan, do respectfully recommend for your consideration the application of.....for a license as a real estate broker.

We do hereby certify that we are well acquainted with the applicant(s) and also certify that he (they) has (have) a good reputation for honesty, integrity and fair dealing, and that we are satisfied that he (they) is (are) worthy of the license for which he (they) applies (apply).

Name

Address

Name

Address

§ 241. Application for License as a Real Estate Salesman.—

MICHIGAN SECURITIES COMMISSION

(Department of Real Estate.)

To the Michigan Securities Commission, Lansing, Michigan:

1. In compliance with Act No. 306 of the Public Acts of 1919, I.....hereby make application for a license authorizing me to transact the business of a REAL ESTATE SALESMAN in conformity with the law regulating and licensing such business in the State of Michigan, and tender the FEE of TWO DOLLARS HEREWITH.

2. Business address (street and number).....

(City or town).....

3. Residence (street and number).....

(City or town).....

4. Name and address of present employer.....

(If not employed at present answer question five instead.)

5. Name and address of prospective employer.....

(If question four was answered put nothing here.)

6. Name and address of last employer.....

7. What line of business or occupation have you followed during the past five years? State places and length of time where continuous for sixty days or more.....

8. The following real estate owners, located in the various places noted in answer to question seven are well acquainted with my activities there. (Do not use your endorsers as reference):

9. Have you been in any real estate litigation during the past year?.....

State nature of complaint.....

Signed (applicant).....

Sworn to and subscribed before me, a notary public in and for the county of....., State of Michigan, this..... day of....., 192.....

(Seal)

My commission expires.....

(City or town)..... (County)....., Michigan.

(Date).....192.....

I, ... licensed real estate broker, with place of business in.....County, Michigan, do hereby request that the application of..... for a license as a real estate salesman be granted.

The applicant is now (or expects to be) in my employ.

I certify that he (she) is honest, truthful, of good reputation and entirely worthy of the license for which he (she) applies.

Signed (broker).....

Address

RECOMMENDATION

(Two endorsers required.)

We, the undersigned, who are, and have been for a period of a year past owners of real estate in the county of....., Michigan, do respectfully recommend for your consideration the application of.....for a license as a real estate salesman.

We do hereby certify that we are well acquainted with the applicant and also certify that he (or she) has a good reputation for honesty, integrity and fair dealing, and that we are satisfied that he (she) is worthy of the license for which he (she) applies.

Name

Address

Name

Address

A fee of ten dollars must accompany the application for a broker's license, and five dollars for every annual renewal. The salesman's license fee is two dollars and the yearly renewal one dollar.⁵

Where a verified complaint in writing of any person is presented to the Commission, the Commission is required to investigate the actions of any broker or salesman, at a place prescribed by the Commission, after notifying the broker or salesman, and may suspend or revoke any license where he is found guilty of any the following:

1. Making any substantial misrepresentation, or
2. Making any false promises of a character likely to influence, persuade or induce, or
3. Pursuing a continued and flagrant course of misrepresentation or the making of false promises through agents or salesman or advertising or otherwise, or
4. Acting for more than one party in a transaction without the knowledge of all parties thereto, or
5. Representing or attempting to represent a real estate broker other than the employer, without the express knowledge and consent of the employer, or
6. Failure to account for or to remit for any moneys coming into his possession which belong to others, or
7. Changing his business location without notification to the Commissioner.
8. Failure of a broker to return salesman's license within five days as provided in Section 10.
9. Paying a commission or valuable consideration to any person not licensed under the provisions of this Act.
10. Any other conduct whether of the same or a different character than hereinbefore specified, which constitutes dishonest or unfair dealing.⁶

The finding of the commission may be reviewed by the Supreme Court, as to questions of law only, the findings of fact being conclusive, and application must be made to the

5. Public Acts, Mich. 1919, No 306, Sec. 11.

6. Public Acts, Mich. 1921, No. 387, Sec. 13.

Supreme Court within thirty days after determination by the Commission.⁷

§ 242. The Commission Agreement.—By amendment to the Statute of Frauds, it is provided that every agreement, contract or promise to pay any commission for or upon the sale of any interest in real estate, shall be void, unless such agreement, contract or promise or some note or memorandum thereof be in writing, and signed by the party to be charged therewith.⁸

To satisfy the Statute of Frauds the promise to pay must be in writing and must state the parties to the agreement, nature of the services to be performed, the property to be sold, the commission to be paid,⁹ but it is not necessary that the selling price or terms of sale be included, and need not contain all the details necessary to be stated in an agreement to sell and convey real estate, and it is sufficient if the writing be a promise to pay a commission for or upon a sale of real estate.¹⁰

Where the writing has a statement that the commission is to be paid "at the time of settlement of sale," the client can not take advantage of the statement to evade his liability for the commission, where the consumation of the sale is prevented by his refusal to perform.¹¹

Where a broker presented an agreement to the owner of a house, whereby he was to have exclusive listing for two months, and an extension until such time as he received ten days' written notice of cancellation, or if sold within three months by the broker, and the testimony showed that the owner, a woman, signed the agreement after telling the broker to erase the clauses concerning the ten days' notice and the sale within three months, and to change exclusive listing from two months to one, she being almost blind, signing the paper without her glasses, it was held that the broker could not re-

7. Public Acts, Mich. 1921, No. 387, Sec. 14.

8. Public Acts, Mich. 1913, No. 238; 3 Compiled Laws, 1915, Sec. 11981.

9. *Greenberg v. Sakwinski*, 211 Mich. 505.

10. *Cochran v. Staman*, 201 Mich. 639.

11. *Greenberg v. Sakwinski*, 211 Mich. 505.

cover, as the agreement, without the erasures did not truly represent the agreement between the broker and the owner.¹²

Where a broker contracts that he shall be entitled to a commission "in case he effects a sale," it was held that his right to commission accrues when a contract to buy and sell is signed, although a formal deed has not been executed.¹³

The phrase, "every agreement, promise, or contract to pay any commission for or upon the sale of any interest in real estate," used in the Statute of Frauds, has been construed to apply to a purchase as well as to a sale, the argument that an agreement to purchase real estate is not one to sell real estate, being a too narrow construction of the statute.¹⁴

The fact that the promise to pay a commission was not in writing will bar the broker from suing upon the quantum meruit for services actually performed, and upon proof of their value.¹⁵

A real estate broker approached a farmer and orally agreed to pay him a certain amount if he furnished a customer for certain premises. The compensation to be paid the farmer was held to constitute "commission" and within the law of 1913 requiring same to be in writing, and the court also held that the statute requiring the agreement to be in writing applied to other persons as well as those between owner and broker.¹⁶

The agency of a broker whose employment is definitely limited by his contract, terminates with the expiration of the time specified,¹⁷ and where no time is specified, the contract continues for only a reasonable time,¹⁸ but ordinarily the broker is entitled to notice of the revocation of his authority.¹⁹

An option given to a broker to sell a certain farm, providing that same could be terminated by thirty days' written notice, the giving of such notice terminated the contract, and the

12. *White v. Hoenighousen*, 211 Mich. 471.

13. *Cain v. Masurette*, 196 Mich. 7.

14. *Slocum v. Smith*, 195 Mich. 281.

15. *Slocum v. Smith*, 195 Mich. 281; *Paul v. Graham*, 193 Mich. 447.

16. *Smith v. Starke*, 196 Mich. 311.

17. *Beadle v. Sage Land Co.*, 140 Mich. 199; *West v. Demme*, 128 Mich. 11.

18. *Friedenwald v. Welch*, 174 Mich. 399.

19. *Nolan v. Swift*, 111 Mich. 56.

broker was not entitled to any commission; the rule that the owner cannot, with knowledge that the broker is negotiating a sale, cancel the contract and avoid payment of the commission, is not applicable.²⁰

The broker is ordinarily strictly confined to his instructions, but he has, however, implied authority to do any act or to make any declaration in regard to the property which is necessary to effectuate a purchase or sale.²¹

The ordinary authority of the broker is merely to find a purchaser who is ready, able, and willing to enter into a contract on the terms specified by, or acceptable to the principal, except where the broker is clearly given the authority to complete a sale binding upon the principal.²²

§ 243. **Duties of the Broker.**—A broker must act in good faith and in the interest of his principal and an agent to sell may not become the agent of the purchaser, nor may an agent to buy become the agent of the seller, unless both principals are fully and fairly acquainted with the fact that the agent was acting in a dual capacity; but if both, knowing the circumstances, consent that the agent may so act, the agreement for commission is valid and enforceable.²³

Where a real estate broker represented both the buyer and the seller, and informed the buyer that the lowest price the seller would take for the farm was \$7,000.00, when in fact the seller had engaged the broker to sell at \$5,300.00, the broker to have all he obtained over that amount, it was held that if the purchaser relied upon the representation, and acted upon it, it was a fraud upon the purchaser; the broker's duty was to disclose the fact that he was acting for both parties and also to disclose all the facts in his possession as to the value of the farm; and in a suit for an accounting the broker was liable for the amount he profited by the fraud.²⁴

20. *Holmes Realty Co. v. Silcox*, 194 Mich. 59.

21. *Smith v. Mich. Realty Co.*, 175 Mich. 600.

22. *Vaughn v. Sheridan*, 50 Mich. 155.

23. *Kirby-Sorge-Felske Co. v. Doty*, 190 Mich. 533; *Hannan v. Prentis*, 124 Mich. 417.

24. *Moore v. Meade*, 213 Mich. 597; *Hogle v. Meyering*, 161 Mich. 472; *Woods v. Palmer*, 151 Mich. 30; *Phinney v. Hall*, 101 Mich. 451.

The broker must act for his principal alone, and a promise by one of the principals in an exchange of real estate, after negotiations were completed, to pay a commission to the other party's broker, to whom he owed nothing, was void for want of consideration.²⁵

Where a broker is employed merely to bring the parties together, and they make their own bargain, thus giving him no discretion or confronting him with a conflict of duties, he may recover commission from both parties.²⁶

Where the broker deals with his principal through an attorney, he is not excused from acting in good faith, nor would lack of diligence on the part of the attorney to discover fraudulent conduct of the broker, active or passive, excuse the broker.²⁷

The contract entered into between two principals is voidable where the broker represented both without the knowledge of one, and the one seeking to avoid the contract need not show that any improper advantage had been gained over him, and he may repudiate the contract irrespective of any proof of actual fraud.²⁸

A broker may not deal with the subject matter of his agency for his own advantage, and where he overstates the price at which it may be bought and obtains the difference, the principal may recover the excess from him,²⁹ and a broker employed to sell property cannot become the buyer thereof either directly or indirectly³⁰

§ 244. When Commission Earned.—The commission payable to the broker must be set up in the contract and where the defendant listed a certain property with a real estate broker for rent, promising to pay a commission to the broker, but also reserving the right to rent the premises himself and not pay any commission if the tenant was secured by himself, the

25. *Lister v. Sakwinski*, 206 Mich. 121.

28. *McCully v. Rivers*, 203 Mich. 417.

26. *Flattery v. James Cuning-
ham Son & Co.*, 125 Mich. 467;
Friar v. Smith, 120 Mich. 411.

29. *Hogle v. Meyering*, 161 Mich. 472.

27. *McCully v. Rivers*, 203 Mich. 417.

30. *Kimball v. Ranney*, 122 Mich. 160.

court laid down the test to be: "Was the broker the procuring cause of the sale or lease?" and held that the right of authority is to the effect that if a broker, even though he did not have the exclusive agency, was in fact the procuring cause of the purchase or lease, and would otherwise be entitled to commissions, he will not be deprived thereof by the fact that the owner at the time of the sale or lease did not know of the broker's instrumentality in procuring the purchaser or lessee.³¹

It is a settled rule of law that a broker who has knowledge of restrictions in the seller's title, may not recover his commission where the sale fails of consummation because of such restriction,³² but the rule does not apply where it is the intention of the parties that the seller should perfect the title by removing the encumbrance.³³

A written contract required the broker to furnish a buyer for premises, "price \$7,000.00, amount down \$1,000.00, \$100.00 every six months and interest," and where the broker furnished a buyer who had \$900.00 in cash, and who owned property worth \$6,000.00, and was willing to enter into an agreement on

31. *McCready v. Nicholson*, 213 Mich. 551; *Kinsey v. Barth*, 192 Mich. 219; *McGovern v. Vennett*, 146 Mich. 558; *Heaton v. Edwards*, 90 Mich. 500; *Hoadley v. Savings Bank (Conn.)*, 44 L. R. A. 321, and note.

Gettleston v. Lewis, 206 Mich. 113, where the court said if the principal's title is defective and the agent has knowledge of such defect and it is not such a defect as may be removed by the principal, the agent does not earn his commission by producing as a purchaser one who is willing to and does contract for only a good or a merchantile title.

Cain v. Masurette, 196 Mich. 7, where the court held that the broker could not recover unless it was the intention of the parties that the principal should subse-

quently perfect his title in order to be able to perform.

Appleby v. Sperling, 194 Mich. 681, where the principal agreed to furnish an abstract and tax history showing clear title the agent advising the principal that mineral reservations would not injure his title, and later the buyer produced by the agent refused to complete the sale upon learning of the mineral reservations, and the court held that the agent could not recover his commission.

32. *Chapin v. Bolles Iron & Wire Works*, 213 Mich. 515, where the defendant advised the broker that he could have the leases now on the premises removed, and the deal was not consummated by reason of the defendant's failure, the broker recovered his commission.

33. *Brackenridge v. Claridge (Tex.)*, 43 L. R. A. 593, and note.

defendant's terms, the broker produced a buyer who was ready, willing and able to buy, and was entitled to his commission.³⁴

An agreement to pay a commission whereby the broker was required to make a lease with one R. W., at terms and conditions satisfactory to the C. S. B. company, limits the right of recovery of the broker for his commissions upon his success in making the lease as per the agreement.³⁵

Where a broker was engaged to secure a purchaser for the sale of defendant's business, consisting of a barber shop and a laundry agency, he did not procure a buyer, able, ready and willing to buy, if the buyer refused to assume defendant's agency contract with the laundry company, and the sale was not consummated, and the defendant was thereby relieved from paying any commission.³⁶

Promissory notes given by a principal to his broker as commission in a certain deal whereby the broker was to procure a loan for the principal and manage the execution of a certain land contract, were held void for failure of consideration where the deal was not consummated.³⁷

In a suit against the vendee for commission on the sale of a land contract, the plaintiff contended that the vendor had left money with the vendee to pay the commission, but it was held that the statement of the vendor made to the vendee that there was \$25.00 due the plaintiff and he expected the vendee to pay it, was insufficient evidence to support plaintiff's claim.³⁸

A real estate broker who has agreed in writing to furnish a buyer within a stipulated time, can not recover his commission before the time stipulated has expired, unless he has produced a buyer who was willing and able to pay the contract price in the time fixed by the writing.³⁹

The vendor's equitable lien for the purchase price in a land contract, where the agreement was that the vendee should

34. *Garrise v. Kars*, 201 Mich. 643.

37. *Newman v. Adelsperger*, 206 Mich. 683.

35. *Fleming v. James S. Holden Co.*, 200 Mich. 519.

38. *Edwards v. Thawan*, 187 Mich. 361.

36. *Hunter v. Blasser*, 194 Mich. 157; *Morgan v. Zanger*, 188 Mich. 212.

39. *Crawford v. Cicotte*, 186 Mich. 270; *Biddle v. Biddle*, 202 Mich. 160.

pay the entire commission of the broker as a part of the purchase price, attached in favor of the broker, on the signing of the contract.⁴⁰

40. Biddle v. Biddle, *supra*.

CHAPTER XV

OPTIONS

- § 245. Definition and Nature, Real Estate Options.
- § 246. Formal Requisites.
- § 247. Form of Options.
- § 248. Consideration.
- § 249. Statute of Frauds.
- § 250. Option Contract Distinguished From Contract of Sale.
- § 251. Option Contract Distinguished From Agency.
- § 252. Assignability of Option Contract.
- § 253. Time of Exercising Option Contract.
- § 254. Discharge of Option Contract.
- § 255. Payment and Tender.
- § 256. Effect of Exercising Option or Election.
- § 257. Against Whom Enforceable.
- § 258. Remedies.
- § 259. Specific Performance.
- § 260. The Option Upheld.
- § 261. The Option Defeated.
- § 262. Controversy as to the Character of the Instrument.

§245. **Definition and Nature—Real Estate Options.**—An option may be defined as a contract by which the owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a specified time. It is neither a sale of land nor an agreement to sell, but merely the disposal of a privilege of electing to buy in accordance with the terms and conditions of the option contract.¹ An option contract does not consist of a privilege to purchase only but it may be a privilege to sell in which case the right of election is with the seller.² Such option contract, before acceptance, vests no title, legal or equitable in the optionee, and the assignment thereof by the optionee, vests no title to the land, legal or equitable, in his assignee.³

1. *Cameron v. Shumway*, 149 Mich. 634; *Barnes v. Husted*, 219 Pa. St. 287, 68 Atl. 839; *Benedict v. Pincus*, 191 N. Y. 377, 84 N. E. 284.

2. *Morgan v. Forbes*, 128 N. E. 792.

3. *West Virginia Pulp & Paper Co. v. Cooper*, 106 S. E. 55.

§ 246. **Formal Requisites.**—The option must be in writing and signed by the owner of the land or his authorized agent, the contract being within the Statute of Frauds.⁴

While it is preferable to specify the time during which the option contract is to run, nevertheless, a failure to do so does not necessarily invalidate the option. If a consideration is present, it will remain open for a reasonable time.⁵

§ 247. **Form of Option.**—

This agreement, made and entered into this.....day of....., A. D. 19....., between A. B. of....., hereafter called the optionor, and C. D. of....., hereafter called the optionee,

Witnesseth: In consideration of \$....., receipt of which is hereby acknowledged, optionor gives and grants unto the optionee and to his heirs, and assigns, the exclusive right or privilege of purchasing on or before the.....day of....., A. D. 19....., all that certain piece of real estate owned by the optionor and situated in (township or city) of....., county of....., and State of Michigan, more particularly described as follows (here insert complete description of property): For the sum of \$....., to be paid according to the following terms (here insert terms).

Notice of the election to purchase hereunder by the optionee or his assigns, shall be in writing, and shall be given to the optionor at within days after notice of election to purchase, the optionor agrees to furnish at his own cost and expense a abstract of title brought down to date.

The optionee, his heirs or assigns shall have.....days from and after delivery of said abstract of title within which to examine the same.

If the title to the above described property is well vested in said optionor and is free and clear of all encumbrances except, then the optionee shall fully perform his part of

4. *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417; 11 Atl. Rep. 284.
5. *Kellow v. Jory*, 141 Pa. St. 144. 21 Atl. Rep. 522; *Hanley v. Water-son*, 39 W. Va. 214, 19 S. E. 536; *Vassault v. Edwards*, 43 Calif. 459; *Larmon v. Jordan*, 56 Ill. 204.

said option contract in accordance with the terms as heretofore stated, but if the title to such described property shall be other than as above stated, then this option shall be at an end and the optionor shall pay to the optionee on demand, all moneys theretofore paid by the optionee on account of the said price.

Upon performance by the optionee hereunder, the optionor agrees to convey to him, or his heirs and assigns, by good and sufficient warranty deed, and to deliver up possession of said property.

Witness: The hands and seals of the said parties the day and year first above written.

In presence of:

----- (A.)

§ 248. **Consideration.**—An option, like all other contracts, requires a valuable consideration to support it. In the absence of a valuable consideration, a writing although in the form of an option, is not a contract, but a mere offer to sell. This may be withdrawn by the owner any time before it has been accepted by the other party.⁶

An acceptance of the offer, however, duly communicated to the owner before the offer is withdrawn, binds the owner to make a conveyance, and the want of a consideration for the option is no excuse; the acceptance of the offer to sell completing a contract of sale of the property.⁷

The consideration to support an option contract must be distinct from the price of the land. Something of which it can be said, this was given by the proposed purchaser to the proposed vendor as the price for the option or privilege to purchase.⁸ An advance payment to be returned with the

6. *Axe v. Tolbert*, 179 Mich. 356, 146 N. W. 418; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 745; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.

7. *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Yerkes v. Richards*, 153 Pa. St. 646, 34 Am. St. Reps.

721, 26 Atl. Rep. 221; *Fitzgerald v. Boyle*, 193 Pac. 1109.

8. *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Murphy v. Reid*, 125 Ky. 585, 101 S. E. 964, 128 Am. St. Reps. 259, 10 L. R. A. New Series, 195; 27 Ruling Case Law 338.

privilege of purchasing is insufficient to support an option.⁹ On the other hand, the courts have held that where the option contract provides that in case a sale of the land afterwards follows the option, the consideration therefor is to be applied as a part of the purchase price; that such consideration is sufficient to support the option.¹⁰

Unless required by the statute of frauds in a particular jurisdiction, the consideration to support an option need not be expressed but may be proved aliunde.¹¹

In some jurisdictions it is held that an instrument under seal imports a consideration.¹²

According to the great weight of authority, the inadequacy of the consideration, if there is want of a valuable consideration, does not effect the binding effect of an option,¹³ and a nominal sum of \$1.00 is sufficient.¹⁴ A mere recital of a nominal consideration, which is not paid or agreed to be paid, is insufficient however to support an option contract.¹⁵

§ 249. Statute of Frauds.—While an option contract does not convey any interest or estate in the land until after an election to purchase in accordance with the terms and conditions of the option contract, nevertheless, such a contract comes within the operation of the statute of frauds. A description of the premises and the terms must be sufficiently complete to meet all the statutory requirements.¹⁶

For a full discussion of the Michigan decisions relating to the statute of frauds see Chapter II ante; and those decisions relating directly to options, see sections 260, 261 and 262, Post.

9. *Friendly v. Elwert*, 57 Ore. 599, 112 Pac. 1085, Annotated Cases, 1913 A 257.

10. *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Reps. 17, 24 Pac. 695.

11. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Thomason v. Bescher*, 176 N. Car. 622, 97 S. E. 654; 2 Am. Law Reps. 626.

12. *Hobbs v. Brush Co.*, 75 Mich. 550.

13. *Ross v. Parks*, 93 Ala. 153, 8 Southern Reps. 368, 30 Am. St. Reps. 11 L. R. A. 148.

14. *George v. Schuman*, 202 Mich. 241, 168 N. W. 486.

15. *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133.

16. *Hilberg v. Greer*, 172 Mich. 505, 138 N. W. 201; *Esslinger v. Pascoe*, 129 Iowa 86, 105 N. W. 362, 3 L. R. A. New Series 147; See C. L. of Mich., 1915, Sec. 11977.

§ 250. **Option Contract Distinguished From Contract of Sale.**—An option contract is unilateral and becomes bilateral only after an election to purchase has been made by the optionee. A contract of sale is bilateral and both parties to the contract are equally bound from the beginning. Herein lies the distinction between an option contract and a contract of sale.¹⁷

This is the true criterion to determine into which class a contract relating to land falls, regardless of which name the contracting parties themselves may apply to the transaction.¹⁸

§ 251. **Option Contract Distinguished From Agency.**—An Owner of property placing it in the hands of a real estate broker for sale may give an option which will be binding as such.¹⁹ Generally, however, the employment of a broker to sell real estate constitutes a contract of agency,²⁰ thus differing

17. Test as to Character of the Instrument.

Pangburn v. Sifford, 216 Mich. 153-162. In this case there was a controversy as to whether or not the receipts in question show a contract or an option. "It is true there is more or less language made use of in the receipt which is more suitable to a contract than to an option, but the real test by which it must be determined is whether both parties are bound by the agreement. Whether there is mutuality of contract. If defendants were obliged to sell and plaintiff to buy, then it is a contract. The receipt was not signed by plaintiff. Therefore, we conclude that he could purchase the premises or not, as he saw fit. This makes the agreement a unilateral option contract. This is made plain by the recent case of Tattan v. Bryant, 198 Mich. 515." Winders v. Keenan, 161 N. Car. 628, 77 S. E. 687; Darr v. Mummert, 57 Neb.

378, 77 N. W. 767; In re Allen, 183 Fed. 172.

18. Solomon v. Shewitz, 185 Mich. 620, 152 N. W. 196; Tattan v. Bryant, 198 Mich. 515, 165 N. W. 778; Cavada v. Diaz, 37 Philippine Reps. 982; Berry v. Humphries, 76 W. Va. 668, 86 S. E. 568; Hazelton v. Le Duc, 10 App. Cases D. C. 379; Hamberger v. Thomas, Texas Civil Appeals, 118 S. E. 770; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Golden v. Cornett, 154 Ky. 433, 157 S. W. 1076.

19. Kellow v. Jory, 141 Pa. St. 144, 21 Atl. 522; Reimer v. Rice, 88 Wisc. 16, 59 N. W. 450; Russell v. Andrae, 79 Wisc. 108, 48 N. W. 117; Levy v. Roth, 39 N. Y. Supp. 1057, 17 Misc. Reps. N. Y. 40; Hunkabee v. Shepard, 75 Ala. 342; Strang v. Gosse, 110 Mich. 153, 67 N. W. 1108.

20. Tate v. Aitken, 5 Calif. App. 505, 90 Pac. 836; Chesborough v. Vizard Investment Co., 156 Ky. 149,

materially from an option which confers the privilege of bringing into existence relation of vendee and vendor between optionee and optionor.

§ 252. Assignability of Option Contract.—By the great weight of authority, an option contract for the purchase of real estate based on a valuable consideration is assignable,²¹ and the assignee may compel the owner to specifically perform the contract.²²

On the other hand, an option to purchase land may, by express language, be limited to the optionee, in which case he cannot, by an assignment, substitute in his stead any other person,²³ and there are cases holding an option contract unassignable on account of the personal elements entering into the transaction.²⁴

§ 253. Time of Exercising Option Contract.—Time is of the essence of an option contract, and the prospective purchaser must act strictly within the period limited and communicate his acceptance to the owner before its expiration.²⁵

160 S. W. 725; *Farday Coal Co. v. Owens*, 26 Ky. Law Reps. 243, 80 S. W. 1171; *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418.

21. *Perkins v. Hadsell*, 50 Ill. 216; *Wilkins v. Hardaway*, 159 Ala. 565, 48 S. 678; *Strasser v. Steck*, 216 Pa. St. 577, 66 Atl. 87; *Kreutzer v. Lynch*, 122 Wisc. 474, 100 N. W. 887; *Cameron v. Shumway*, 149 Mich. 634, 113 N. W. 287; *Contra-Wheeling Creek Gas, Coal & Coke Co. v. Elder*, 170 Fed. 215; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150.

22. *Soffrain v. McDonald*, 27 Ind. 269; *House v. Jackson*, 24 Ore. 89, 32 Pac. 1027.

23. *Andrew v. Myerdirck*, 87 Md. 511, 40 Atl. 175; *Meyers v. Stone*, 128 Iowa 10, 102 N. W. 507, 111 Am. St. Reps. 180, 5 Ann. Cases 912.

24. *Rice v. Gibbs*, 40 Neb. 264, 58 N. W. 724; *Snow v. Nelson*, 113 Fed. 353; *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853.

25. *Tattan v. Bryant*, 198 Mich. 515, 165 N. W. 778; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743; *Stenbridge v. Stenbridge*, 87 Ky. 91, 7 S. W. 611; *Longworth v. Mitchel*, 26 Ohio St. 334; *Smith v. Fleeks*, App. 69 Pa. St. 474; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. Reps. 417; *Bostwick v. Hess*, 80 Ill. 138; *Richardson v. Hartwick*, 106 U. S. 252; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Vassault v. Edwards*, 43 Calif. 458; *Weiss v. Claborn*, 219 S. W. 884; *Hughes v. Holliday*, 149 Ga. 147, 99 S. E. 301; *Saraceno v. Carrano*, 92 Conn. 563, 103 Atl. 631.

If no specific time is mentioned in the option contract, the optionee must exercise his right of election within what, under all the circumstances of the particular case, would be a reasonable time.²⁶

Acceptance may be made on the last day of the time specified,²⁷ and the option expires on the date specified without any action on the part of the owner of the land, and it is not necessary for him to give notice of forfeiture to the optionee.²⁸

The sale of the land need not be completed within the time limited for acceptance, unless expressly required by the terms of the option contract, time being of the essence of the option as to the acceptance or election, as it is usually called, but not as to its performance, and if an election is duly made within the allotted time, the parties are entitled to a reasonable time expressed but may be proved aliunde.¹¹

§254. Discharge of Option Contract.—An option contract, not supported by a valuable consideration, may be revoked at any time by the optionor signifying his intention to do so, if the optionee has knowledge of such act prior to his acceptance.³⁰

The expiration of the time limit when expressly fixed by the option contract terminates the right of the optionee to elect, or the expiration of a reasonable time, when no time is expressly specified.³¹

When an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding. Any offer without consideration may be withdrawn at any time before acceptance providing the intention to withdraw is communicated to

26. *Saraceno v. Carrano*, 92 Conn. 563, 103 Atl. 631; *Larmon v. Jordan*, 56 Ill. 204; *Kellow v. Jory*, 141 Pa. St. 144, 21 Atl. 522; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

27. *Houghwout v. Boisaubin*, 18 N. J. Eq. 315.

28. *Cummings v. Lake Realty Co.*, 86 Wisc. 382, 57 N. W. 431.

29. *Breen v. Mayne*, 141 Ia. 399, 118 N. W. 441; *Smith & Fleek's*

Apps, 69 Pa. St. 474; *Boston R. R. v. Rose*, 194 Mass. 142, 80 N. E. 498; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. 105 Atl. 486.

30. *Bower v. McCarthy*, 85 Mich. 26, 48 N. W. 155.

31. *Stewart v. Gardner*, 152 Ky. 120, 153 S. W. 3; *Mossie v. Cyrus*, 61 Ore. 17, 119 Pac. 485.

the optionee prior to his acceptance, and an offer which in its terms limits the time of acceptance is withdrawn by expiration of the time.³²

If the optionee abandons his rights under the option before the expiration of the time limit, the optionor has a right to consider the option contract ended,³³ and thereafter the optionee may not exercise his right to purchase.³⁴ Can claim no damages arising out of the option,³⁵ and is estopped to ask for specific performance.³⁶

The parties to an option contract may discharge their old contract by substituting a new one,³⁷ or by a mutual rescission, but a request by one of the parties to the option for an alteration or modification of an accepted option is not a breach thereof giving a right of rescission or an action thereon.³⁸ Also the offer of a lesser price for land by the optionee is not a refusal to take at the option price so as to terminate the option,³⁹ and an option for the purchase of land was not withdrawn by giving a second option to another party, which did not bind the optionor to convey except upon the expiration of any prior option that might exist.⁴⁰

§ 255. Payment and Tender.—An option contract, as heretofore stated, is raised into a mutually binding contract of sale thus crediting the relation of vendor and purchaser between the parties only after a timely election on the part of the optionee in accordance with the terms of the option. Accordingly, the payment or tender of the purchase price is important in determining whether or not the optionee has perfected his right to specifically enforce the contract or in

32. *Waterman v. Banks*, 144 U. S. 394; *Richardson v. Hartwick*, 106 N. W. 252.

33. *Meidling v. Trefz*, 48 N. J. Eq. 638, 23 Atl. 824; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

34. *Eagle v. Pettus*, 109 Ark. 310, 159 S. W. 1116.

35. *Darragh v. Vicknair*, 126 La. 171, 52 South 264.

36. *May v. Getty*, 140 N. C. 310, 53 S. E. 75.

37. *Cleaves v. Walsh*, 125 Mich. 638, 84 N. W. 1108.

38. *Turner v. McCormick*, 56 W. Va. 161, 49 S. E. 28, 107 Am. St. Reps. 904, 67 L. R. A. 853.

39. *Baxter v. Calhoun*, 222 Fed. 111.

40. *Ward v. Davis*, 154 Mich. 413, 117 N. W. 897.

lieu thereof to maintain an action for damages by virtue of the breach in case the optionor should refuse to consummate the sale. The manner of exercising an option is governed by the language of the instrument granting it.

Where payment of the purchase money or a part thereof must accompany the election, a compliance of such provision is necessary in order to effect a binding contract of sale.⁴¹

However, its terms may require merely that notice be given of the exercise of the option right and leave the matter of payment to be thereafter settled.⁴²

In the former case, payment of the purchase price in exercising the option is a condition precedent to the creation of a contract of sale. In the latter case, there is an election to take the land on the terms proposed, payment of the purchase price being part of the executory contract of sale brought into existence by the election.⁴³

Where land is subject to an encumbrance, if a tender of the purchase price is necessary in exercising the right of the option, the amount of such encumbrance may be deducted,⁴⁴ and it has been held that a strict tender may be dispensed with where the encumbrance is of such a nature as to be incapable of ascertainment without a judgment of the court.⁴⁵

§ 256. Effect of Exercising Option or Election.—If the privilege of electing to purchase is seasonably exercised in accordance with the terms of the option contract, an executory contract of sale arises,⁴⁶ and thereafter the parties stand in the

41. *Kelsey v. Crowther*, 162 U. S. 404; *Martin v. Morgan*, 87 Calif. 203, 25 Pac. 350, 22 Am. St. Reps. 240; *Trogden v. William*, 144 N. Car. 192, 56 S. E. 965, 10 L. R. A. New Series 867; *Agar v. Streeter*, 183 Mich. 600, 150 N. W. 160, also see note 24 L. R. A. New Series 9.

42. *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. New Series 1150.

43. *Breen v. Mayne*, 141 Iowa 399, 118 N. W. 441; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

44. *Smiddy v. Grafton*, 163 Calif. 16, 124 Pac. 433, Anno. Cases 1913, E. 923.

45. *Rockland Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. W. 43, L. R. A. 1916, F. 352.

46. *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 89, 43 L. R. A. N. S. 1150, *Ruling Case Law* 346; *Curran v. Rogers*, 35 Mich. 221, *Goldberg v. Drake*, 145 Mich. 50, 108 N. W. 367.

relation of vendor and purchaser with the rights and remedies common to such a relation; such rights and remedies being more fully treated in other sections of this book.

§ 257. **Against Whom Enforcible.**—The optionee of an option contract may enforce the same not only against the optionor, but also against a third party, who is a purchaser of the optioned property with notice of the outstanding option, if notice of election is timely given,⁴⁷ and the fact that the optionee in an option contract for the purchase of real estate may have a remedy at law against the optionor for a breach of the contract to convey does not prevent the optionee from having specific performance of the contract,⁴⁸ although on account of the particular equities involved the courts have held otherwise.⁴⁹

The option contract may be enforced against the heirs, devisees and representatives of the optionor in case of his death before the right of election has been exercised by the optionee, providing such election is duly made within the specified time, and in accordance with the requirements of the option contract.⁵⁰

An option contract cannot be enforced against third persons who become purchasers for value of property in ignorance of the option.⁵¹

§ 258. **Remedies.**—Inasmuch as an option contract is but a continuing effort which, when supported by valuable consideration, is kept open for a specified time, or if no time is specified, a reasonable time, it consequently follows that until there is

47. *Ross v. Parks*, 93 Ala. 153, 8 So. 368, 30 Am. St. Reps. 47, 11 L. R. A. 148; *Smith v. Bangham*, 156 Calif. 359, 104 Pac. 689, 28 L. R. A. New Series 522; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265, Ann. Cases 1912, C. 556; *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99, 43 L. R. A. U. S. 1150.

48. *Forney v. Birmingham*, 173 Ala. 1, 55 So. 618.

49. *Rathbone v. Groh*, 137 Mich. 373, 100 N. W. 588.

50. *Witting's Succession*, 121 La. 501, 46 So. 606, 15 Ann. Cases 379; *Rockland Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43, Ann. Cases 1913, B. page 62, L. R. A. 1916 F. 352; *Mueller v. Northman*, 116 Wisc. 468, 93 N. W. 538, 96 Am. St. Reps. 997.

51. *Barrett v. McAlister*, 33 W. Va. 738, 11 S. E. 220.

an election on the part of the optionee the optionor obtains no rights enforceable under the option contract. After a proper and timely election, however, creating a mutually binding contract of sale, the optionor has all the rights and remedies common to such contracts.⁵²

Likewise when the optionee has made a timely and proper election, a breach on the part of the optionor of the contract of sale brought into existence by the election entitles the optionee to maintain an action for such breach.⁵³

A suit for specific performance⁵⁴ or an action to recover payments made, however, if the optionee has made no election, a breach by the optionor before the expiration of the time specified ordinarily entitles the optionee to recover damages for the breach of the option contract only, but even after a breach of the option contract by the optionor the optionee may still make a timely and proper election within the specified time, thus creating a bilateral contract with all the remedies consequent thereto, and the facts of the case may be such that it may be immaterial whether or not there has been an election.⁵⁵

§ 259. **Specific Performance.** — Where an option is given upon land and duly converted into a binding contract by acceptance in accordance with its provisions, specific performance thereof can be enforced.⁵⁶

52. *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042; *Johnson v. Trippe*, 33 Fed. 530; See James, on Option Contracts, Sec. 1101; *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 8.

53. *Roper v. Milburn*, 93 Neb. 809, 142 N. W. 792, Ann Cases 1914, B. 1225.

54. *George v. Shuman*, 202 Mich. 241; *Sixta v. Ontonagon Valley Land Co.*, 157 Wisc. 293, 147 N. W. 1042.

55. *Pearson v. Horne*, 139 Ga. 453, 77 S. E. 387.

56. *Rude v. Levy*, 43 Colo. 482, 96 Pac. 560, 24 L. R. A. (N. S.) 91, 27 Am. St. Reps. 123; *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150; *Smith v. Bangham*, 156 Calif. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; *Agar v. Streeter*, 183 Mich. 600, 150 N. W. 160, L. R. A. 1915, D. 196; *Mier v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 Am. St. Reps. 586, 12 Ann. Cases 88; *Black v. Maddox*, 104 Ga. 157; *George v. Shuman*, 202 Mich. 241.

There are a few cases that refuse specific performance on the ground of lack of mutuality of obligation, but in these cases the option was not supported by valuable consideration, and consequently nothing more than a continuing offer subject to withdrawal at any time before acceptance,⁵⁷ but although not supported by valuable consideration, such a purported option if accepted before withdrawal creates a mutually binding contract of sale, and there seems to be no sound reason why specific performance should be denied, and the following cases support this theory.⁵⁸

The right to specifically enforce an option after the purchase of real estate being within the legal discretion of the court, specific performance may be refused when the transaction is tainted with fraud or procured by overreaching.⁵⁹

§ 260. Michigan Decisions on Option—The Option Upheld.—In the accompanying note ⁶⁰ we have collected those Michigan decisions where the option has been upheld.

57. *Litz v. Goosling*, 93 Ky. 185, 19 S. E. 527, 21 L. R. A. 127.

58. *Cheney v. Cook*, 7 Wisc. 413; *Boston & N. R. Co. v. Bartlett*, 3 Cushing 224; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Reps. 17, 24 Pac. 695; *Donahue v. Potter & G. Co.*, 63 Neb. 128, 88 N. W. 171; *Perkins v. Hadsell*, 50 Ill. 216.

59. *Wayne Woods Land Co. v. Beeman*, 211 Mich. 360, 178 N. W. 696.

60. Where plaintiffs entered into an option with the defendants for the purpose of purchasing a certain tract of land and they paid only a nominal money consideration, it was held that the option was valid and was not recoverable by the optioner during its time limit. Consideration in this case was \$1.00 and it was for the purchase of 37 acres of land at \$1,000 an acre, the time limit to be one

year. The defendants attempted to have the option declared void on the ground that an unfair price for the land was offered. The Court held that the terms of the option would bind the defendants and it could not be revoked. *George v. Schuman*, 202 Mich. 241.

Where the plaintiffs had entered into a lease for certain premises for a period of three years for a certain sum, a bill for specific performance of the provision to purchase was filed by the plaintiffs after they had tendered the amount of the purchase price as agreed upon. The Court held that specific performance would be decreed and the description in the lease describing the premises as being at a certain street number was held to be sufficient description. The lessor in this case occupied the premises a certain period after the expiration of the

lease and while suit was pending and it was held that the lessor should account for such use and occupation at the time of the filing of the bill. *Nowicki v. Kopelczak*, 195 Mich. 678.

A bill was filed for specific performance of a contract for the sale of certain real estate wherein the property was owned by husband and wife. The option was signed by both the husband and wife, agreeing to sell the property within a certain time, but the defendants set up at the trial that the wife was not named in the option or lease, but merely signed it after her husband had signed it, and set up further that the option was void under the statute of frauds because not accepted in writing. The court held that the option was signed by both parties and one was grantor, and the fact that the other was not named as grantor did not invalidate the instrument, and that the wife signed to make it effective, which under the laws of this state requires that a deed to property held by entirety be signed by both husband and wife. The failure of the wife to sign the option was held not fatal and specific performance was decreed. *Agar v. Streeter*, 183 Mich. 600.

The defendants in this case executed a contract for a 99-year lease of certain property with the provision therein that the plaintiff could purchase the same within the time of the lease for a stated amount. The plaintiff filed a bill for specific performance of the contract and the defendants set up as a defense that the agreement was void and that it lacked mutuality and was never accepted in writ-

ing by the plaintiff, and also that the agreement was indefinite and uncertain. The court held that the failure of the lessee to sign the instrument was not material, citing *Smith v. Mathis*, 174 Mich. 262, and *Mull v. Smith*, 132 Mich. 618.

The fact that the agreement specified the rent to be paid so much per year was sufficiently definite to be susceptible of specific performance, citing *Gibbens v. Thompson*, 21 Minn. 298.

And the fact that no time was specified for the purchase of the property did not invalidate the agreement, for the plaintiffs had the right to purchase the property at any time during the period of the lease on tendering the amount named. *Bushman v. Faltis*, 184 Mich. 172.

Two brothers owned property together and held themselves out as a partnership. One of the partners gave an option to the plaintiff for the sale of the property owned jointly by the two brothers. Upon a bill for specific performance the court held that the plaintiff was entitled to specific performance upon the ground that the property was held as partnership property by the two defendants, although only one of the partners signed the option. *Nichols v. Burcham*, 177 Mich. 601.

Plaintiff entered into an agreement for the lease of certain premises within a certain period. The plaintiffs tendered the amount of the purchase price to the defendants and demanded a deed from them, who refused to carry forth the terms of the agreement. The plaintiff continued in possession and

§ 261. **Michigan Decisions on Option—The Option Defeated.**
—In the accompanying note ⁶¹ we have collected a number of Michigan decisions where, for various reasons, the option has been defeated.

paid rent and filed a bill for specific performance. The court entered a decree for the plaintiff and stipulated that the amount of the rentals paid by the plaintiff after a tender and demand for a deed would be applied on the purchase price. *Mentlikowski v. Wisniewski*, 173 Mich. 642.

Where brokers obtained an option from the owner on a farm to procure a purchaser for the owner at a specified price within a given period, the brokers are entitled to the compensation after finding a purchaser who is ready and willing to buy, and such a contract is not within the terms of the statute of frauds. *Brittson v. Smith*, 165 Mich. 222.

A stipulation in a lease giving the lessee the option to renew the lease and to purchase the property forms a part of the inducement for the execution of the lease, is founded on a sufficient consideration, and is valid though it is unilateral in the sense that the lessee is under no obligation to renew or purchase. *Wright v. Kaynor*, 150 Mich. 7.

An option contract for the purchase of land, though it gives the purchaser the right to purchase or not at his option and gives him the choice of remedy by suit for specific performance or action for damages, while limiting the vendor in case of failure to purchase to stipulated damages of one dollar, was examined and held not un-

conscionable. *Mier v. Hadden*, 148 Mich. 488.

61. Where an option to purchase property at a specified price during the term of a lease was included in the lease, it is necessary that the plaintiff tender or make payment of the purchase price during the life of the lease before he is entitled to maintain a suit for specific performance. A failure to tender the amount or to make payment is a sufficient ground to deny relief to one asking for specific performance. *Law v. McKechnie*, 202 Mich. 284.

Plaintiff, a keen, shrewd business man and lawyer, took an option on land to convey by warranty deed certain premises signed by only two of three sisters owning the premises by joint tenancy. The sisters were about 70 years of age and were not familiar with business or real estate and plaintiff did not explain to them the real situation, that they would be unable to fulfill the contract without their sister's signature, who, to his knowledge, refused to sign. The court held that he was guilty of such overreaching in the procurement of the option, although it did not amount to actual fraud, that a court of equity would refuse specifically enforce the option. *Wayne Wood Land Co. v. Beeman*, 211 Mich. 360.

Acceptance of the terms of an option requires an unconditional assent to its terms, and letter sug-

§ 262. Michigan Decisions on Option—Controversy as to the Character of the Instrument.—In the accompanying note ⁶² we have collected a number of Michigan decisions where controversy has arisen over the character of the instrument.

gesting a change in description, inclosing a deed describing the property by dimensions rather by the terms used in the option, was a counterproposition and did not create a contract. *Weadock v. Champe*, 193 Mich. 553.

It was fraud for the holder of an option on real property to represent to a prospective purchaser that he had an option on the property for \$2,500, for which price he would sell, when in fact the option vested the purchase price at \$2,000. *McGough v. Hopkins*, 172 Mich. 580.

Specific performance was properly denied upon a record showing that plaintiff, real estate broker, obtained from the owner of a farm an option in writing to sell the farm on terms stated therein, and that plaintiff read the instrument to the defendant, omitting the clause relating to the consideration, and a clause requiring a 60-day notice in writing of the defendant's intention to terminate his option, and that the defendant, the grantor and owner, was old, feeble, and in ill health and relied upon the plaintiff to read the paper to him and subsequently attempted to revoke the option according to the provisions as he heard it read. *Van Deusen v. Brown*, 167 Mich. 49.

An option given by the owner of land providing that on or before a certain date he would give a warranty deed of the property and an abstract to date, showing

perfect title upon the payment of the stipulated price within the time mentioned, only entitles the purchaser to a deed and abstract when payment of the price is made within the time limited; and where the holder of the option neither accepts it in writing nor tenders the price within the time limited, his right is lost, although he demands the deed and abstract and states that payment will be made when satisfactory title is furnished. *Cameron v. Shumway*, 149 Mich. 634.

A, by letter, asked B for an option for six months to purchase certain real estate. B replied by letter, giving an option for six months for \$2,500. A accepted and notified B that they were ready to take the deed. B then prepared the deed and brought it to A to consummate the agreement. B asked for ten days in which to procure the money. The deed was left in escrow, to be delivered upon the payment of the money, and no further steps were taken until the last day provided by the original offer. Held, that the original offer was superseded by the subsequent agreement and that A lost all right of purchase by his failure to comply with that agreement. *Cleaves v. Walsh*, 125 Mich. 638.

62. In a suit for the specific performances of a ninety-day option for the purchase of land, defendants' contention that the contract was void because not accepted in

writing as required by the statute of frauds, cannot be sustained where, after the defendants refused to perform, suit was commenced within ninety days and the evidence showed that plaintiff paid into court the down payment called for, and tendered the note and mortgage as provided in the contract, with a written statement that he was ready to sign same when deed to him was made. *Frischkorn v. Fitzgerald*, 215 Mich. 106.

An oral agreement for the lease of land for two years with the option of purchase is a valid lease for one year only, and the right of purchase which ran with said oral lease was relieved of the statute of frauds by possession and part performance, and by section 11979, 3 Comp. Laws 1915 (Mich.), which preserves the power of chancery courts to compel specific performances of oral agreements relating to real estate in case of part performance, the plaintiff is entitled to specific performance of his oral agreement by tender of the agreed price in a court of chancery. *Lyle v. Munson*, 213 Mich. 250.

A memorandum of agreement relating to the sale of land which contains no obligation to purchase and makes reference to a "prior option" with the terms of which both parties are familiar, and provides that a deed will be given on a compliance with the "terms of this option" and that on failure to make the stipulated payment the instrument will be canceled, constitutes a mere option and not an agreement for the sale and purchase of land, even though the parties are designated as seller and purchaser and other language more

properly belonging in an agreement is used, since the absence of an obligation to purchase is the distinct characteristic of an option contract. *Tattan v. Bryant*, 198 Mich. 550.

The conveyance of land in consideration of a certain sum of money and an agreement by the vendee to reconvey within three years, if the vendor should so elect and tender the money, must be treated as an absolute conveyance of land with an option to repurchase and not as a mortgage. *Gogarn v. Connors*, 188 Mich. 161; *Sowles v. Wilcox*, 127 Mich. 166; *Bloomberg v. Beekman*, 121 Mich. 647.

A contract relating to the purchase of land wherein the owner agrees to sell, and the vendee agrees to buy, property described in the agreement at a stated purchase price of which \$100 was payable at the execution of the contract, \$400 when an abstract of title was passed upon, and the balance in semi-annual payments of \$100 each with interest, wherein the vendor also agreed to furnish a quitclaim deed releasing the property from certain restrictions, possession to be given and the deal consummated with thirty days, was not an option by an executory contract for the sale of real estate. *Solomon v. Schewitz*, 185 Mich. 621.

The conduct of a prospective purchaser of land in going into possession under an instrument claimed by him to be an option merely, in making payments in accordance with its terms, and in permitting a railroad company to enter upon and construct an elevated road across the property men-

tioned, amounted to an irrevocable election to purchase. *Procter v. Plummer*, 112 Mich. 393.

Options—Acceptance

In order to accept an option so that it becomes a binding contract either one of two things must be done. Either the consideration

must be paid or a written acceptance must be made.

See *Pangburn v. Sifford*, 216 Mich. 163, citing *Wilkinson v. Heavenrich*, 58 Mich. 574; *Hollingshead v. Morris*, 172 Mich. 126; *Mier v. Hadden*, 148 Mich. 488, 618; *Agar v. Streeter*, 183 Mich. 608, L. R. A. 1915 D., 196 Annotated Case 1916, E, page 518.

Table of Cases

Cited in The Law of Land Contracts

[References are to Sections]

- Abbott v. Gregory (39 Mich. 68), 226.
- Abell v. Munson (18 Mich. 312), 20.
- Abright v. Stockhill (208 Mich. 469), 214, 218.
- Acme Elec. Co. v. Van Derbeck (127 Mich. 341, 89 Am. St. 176, Rep. 476), 100, 96.
- Ada Dairy Assn. v. Mears (123 Mich. 470), 16.
- Adams v. Cowherd (30 Mo. 460), 144, 43.
- Adler v. Katus (190 Mich. 86), 10, 18.
- Agar v. Streeter (183 Mich. 600, 150 N. W. 160 (now) 24 L. R. A., new series 9), 255, 259.
- Alexander v. Hodges (41 Mich. 691-694), 144.
- Alderman & Sons Co. v. McKnight (78 S. E. 982, 95 S. Car. 245), 74.
- Aldrich v. Schribner (148 Mich. 609), 204.
- Aldrich v. Scribner (146 Mich. 609), 228.
- Allen v. Cadwell (55 Mich. 8), 117.
- Allen v. Peckwitz (103 Cal. 85, 36 Pac. 1039, 42 A. S. R. 99), 78.
- Allen v. Kirk (219 Pa. 574, 69 Atl. 50), 110.
- Allen v. Caldwell (55 Mich. 8), 58.
- Allen v. Mohn (86 Mich. 328), 114.
- Allen v. Falbat (170 Mich. 664), 218.
- Allison v. Word (63 Mich. 128), 207.
- Allen v. Atkinson (21 Mich. 351) 219.
- Allread v. Harris (75 Ga. 687), 215.
- Alston v. Oregon Power Co. (Ore.) (76 Pac. 964, American and Eng. Enc. Law, 2nd Vol. 26, p. 59), 214.
- Appleby v. Sperling (194 Mich. 681), 224.
- Appeal of Nellie Lewis (85 Mich. 340), 45.
- Anderson v. Baughman (7 Mich. 69), 18.
- Anderson v. Carkins (135 U. S. 4831), 96.
- Anderson v. Kennedy (51 Mich. 467), 113.
- Anderson v. Anderson (251 Ill. 415, 96 N. E. 265, Anno. Cases 1912-C 556), 257.
- Andrew v. Meyerdirch (87 Md. 511, 40 Atl. 173, 175), 172, 252.
- Armitage v. Tall (64 Mich. 412), 86.
- Arthur v. Cheboygan (156 Mich. 152), 97, 104.
- Aspell v. Hosbein (98 Mich. 117), 100.
- Aspenwell v. Vanderbeck (127 Mich. 341), 96.
- Assurance Co. v. Det. Common Council (176 Mich. 80), 59.
- Atkinson v. Akins (197 Mich. 297), 58.
- Attebery v. Blair (244 Ill. 363, 91 N. E. 475, 135 A. S. R. 231), 78.
- Auditor Gen'l v. Fisher (84 Mich. 128), 43, 132.

[References are to Sections]

- Aullman Miller & Co. v. Pettys (59 Mich. 486), 54.
 Austin v. Dalbee (101 Mich. 292), 18.
 Aville v. Periera (120 Cal. 589, 52 Pac. 840), 172.
 Axe v. Talbert (179 Mich. 556, 146 N. W. 418), 108, 248.
 Axtec Copper Co. v. Aud. Gen'l (128 Mich. 620), 82.
 Axtel v. Chase (77 Ind. 14), 231.
 Ayers v. Gallup (44 Mich. 13), 10.
- B
- Baker v. Clark (52 Mich. 22), 43.
 Baldwin v. Trimble (85 Md. 396, 37 Atl. 176, 36 L. R. A. 489), 78.
 Baller v. Spivack (213 Mich. 436), 95.
 Baller v. Spivack (213 Mich. 921), 15.
 Banaghan v. Malaney (200 Mass. 46, 128 Am. St. Rep. 378, 19 L. R. A. (N. S.) 871, 85 N. E. 839), 106.
 Banghman v. Gould (45 Mich. 481), 211.
 Banski v. Michalski (204 Mich. 15), 210, 228, 236.
 Baptiste v. Peters (51 Ala. 159), 215.
 Barber v. Harris (N. Y. 1836, 15 Wends 615), 43.
 Barnard v. Brown (112 Mich. 452), 70.
 Barker v. Finley (200 Mich. 166), 112.
 Barley v. Wells (8 Wis. 141, 76 Am. Dec. 233), 172.
 Barnard v. Brown (112 Mich. 452), 62.
 Barnes v. Gilmore (6 N. Y. Civ. Prac. R. 286), 231.
 Barnes v. Husted (219 Pa. St. 287, 68 Atl. 839), 245.
 Barnhardt v. Hamel (207 Mich. 232), 204, 213, 236.
 Barre v. Fleming (29 W. Va. 314), 78.
 Barrett v. McAllister (33 W. Va. 738, 11 S. E. 220), 257.
 Bartlett v. Smith (146 Mich. 188), 219.
 Bartlett v. Bartlett (103 Mich. 296), 10, 62.
 Bartlett v. Bartlett (103 Mich. 293, 61 N. W. 500), 21.
 Bascombe v. Beckwith (L. R. A. 8 Eq. 100), 110.
 Batt v. Mollon (151 Mass. 477, 25 N. E. 17, 7 L. R. A. 84), 78.
 Bauer v. Long (147 Mich. 351), 43.
 Bawden v. Hunt (123 Mich. 296), 18.
 Baxter v. Ogooshevitz (205 Mich. 249-256), 198.
 Bay County v. Bradley (39 Mich. 163), 156.
 Baylor v. Hanover Fire Ins. Co. (67 Mich. 179), 198.
 Bayne v. Wiggins (139 U. S. 210, 35 L. Ed. 144), 10.
 Baxter v. Calhoun (222 Fed. 111), 254.
 Bayliss v. Priecture's Est. (24 Wis. 651), 19.
 Ball v. Harpman (140 Mich. 661), 19.
 Barron v. Barron (Ala.) (25 La. 55), 76.
 Beach v. Miller (51 Ill. 206), 78.
 Bearse v. Aldrich (40 Mich. 529), 162.
 Beebe v. Lyle (73 Mich. 114) 43a.
 Behr v. Hurwitz (N. J. Eq., 105 Atl. 486), 253.
 Behrens v. Claudy (50 Wn. 400, 97 Pac. 450), 172.
 Benedick v. Pincus (191 N. Y. 377, 84 N. E. 284), 245.
 Bennett v. Harper (36 W. Va. 546, 15 S. E. 143), 214.

[References are to Sections]

- Bennett v. Hickey (112 Mich. 379), 216, 217.
- Benedict v. Bird (103 Iowa 612), 20.
- Benson v. Shotwell (87 Calif. 49, 25 Pac. 249), 250.
- Berger v. Roe (179 Mich. 184), 79.
- Berry v. Humphries (76 W. Va. 663, 86 S. E. 568), 250.
- Berston v. Gilbert (190 Mich. 638), 18.
- Berston v. Gilbert (180 Mich. 638), 18.
- Bertram v. Cook (44 Mich. 396), 151.
- Bidler v. Robinson (73 N. J. Eq. 169), 43.
- Bignell v. Franks (212 Mich. 236), 196-A, 18.
- Bilansky v. Hogan (190 Mich. 463), 122.
- Bird v. Stark (66 Mich. 654), 74.
- Bird v. Hall (30 Mich. 374), 109, 116.
- Birney v. Ready (216 Mich. 7), 112, 143.
- Black v. Maddox (104 Ga. 157) 259.
- Blampey v. Pike (155 Mich. 384), 204, 213.
- Blanchard v. Det. L. & L. R. Co. (31 Mich. 43), 20, 109.
- Blanchard v. R. R. Co. (31 Mich. 43), 112.
- Blanchard v. Det. L. & L. R. Co. (31 Mich. 43), 109.
- Blanck v. Sadlier (153 N. Y. 551, 47 N. E. 920), 78.
- Bland v. Bland (213 Mich. 549), 121.
- Bledsoe v. Games (30 Mo. 448), 62.
- Board v. Wilson (34 W. Va. 609, S. E. 778), 62.
- Boddy v. Henry (126 La. 31, 101 N. W. 497), 211.
- Bond Foster Lbr. Co. v. Northern Pac. R. R. Co. (53 Wash. 302, 101 Pac. 877), 172.
- Boorum v. Tucker (51 N. J. Eq. 135, 26 Atl. 456), 110.
- Bomier v. Caldwell (8 Mich. 463), 10.
- Boone v. Chiles (10 Pet. 177, 9 L. Ed. 338), 214.
- Boston R. R. v. Rase (194 Mass. 142, 80 N. E. 498), 253.
- Boston & M. R. Co. v. Bartlett (3 Cushing 224), 259.
- Bostwick v. Hess (80 Ill. 138), 253.
- Bourget v. Monroe (58 Mich. 563), 109.
- Bowen v. Lansing (129 Mich. 119-121), 186.
- Bowen v. Lansing (129 Mich. 117, 119-121), 43.
- Bower v. McCarthy (85 Mich. 26, 48 N. W. 155), 254.
- Bowman v. Gork (106 Mich. 163), 97, 112.
- Boyntan v. Veldman (131 Mich. 555), 77.
- Boswell's Lessee v. Otis (9 How. 336), 116.
- Brackenridge v. Cloridge (Tex.; 43 L. R. A. 593), 244.
- Bradley v. May (214 Mich. 194), 114, 120.
- Bradley v. Curtis (79 Ky. 327), 43.
- Bradway v. Millier (200 Mich. 648), 63, 122.
- Breen v. Mayne (141 Ia. 399, 118 N. W. 441), 253.
- Breen v. Mayne, 255.
- Brewer v. Dodge (28 Mich. 359), 115.
- Bretz v. Hitchcock (188 Mich. 327), 86.
- Brewer v. Herbert (30 Md. 301, 96 Am. Dec. 582), 23, 78.
- Bridgeman v. McIntyre (150 Mich. 78), 115.
- Brin v. Michalski (188 Mich. 401), 99, 109.
- Brigham v. Rean (138 Mich. 256, 102 N. W. 845), 72.
- Briggs v. Briggs (113 Mich. 371), 112.

[References are to Sections]

- Brin v. Michalski (188 Mich. 400), 17.
 Brewing Co. v. Judge (108 Mich. 356), 164.
 Brosman v. McGee (63 Mich. 454), 19.
 Brooks v. Kearns (86 Ill. 547), 64.
 Brown v. McCormick (28 Mich. 214), 54.
 Brown v. Pierce (7 Wall 205, 19 Led. 134), 231.
 Brown v. Pollard (89 Va. 696, 17 S. E. 6), 21.
 Brown v. McGraw (14 Peters (U.S.) 493), 24.
 Bruner v. Miller (59 W. Va. 36, 52 S. E. 995), 215.
 Bryan v. Hauseman Spelzley Corp. (213 Mich. 236), 213, 215.
 Brodway v. Miller (200 Mich 648), 114.
 Bryant v. Booze (55 Ga. 438), 109.
 Buchoz v. Walker (19/224), 115, 102.
 Buchan v. Ger. Amer. Land Co. (180 Iowa 911, 164 N. W. 119), 78.
 Buck v. Smith (29 Mich. 166), 109, 112.
 Buell v. Irwin (24 Mich. 145), 151.
 Bugaski v. Snika (200 Mich. 418), 171.
 Bugajski v. Siwka (200 Mich. 415), 150.
 Buhler v. Trombley (139 Mich. 557), 20.
 Bullock v. Taylor (39 Mich. 137), 145.
 Bumpus v. Bumpus (53 Mich. 347), 96.
 Bunce v. Bidwell (43 Mich. 542), 70, 152.
 Burbach v. Walker & Son (132 Mich. 93), 86.
 Burch v. Stringham (210 Mich. 48), 257.
 Burchard v. Frazer (23 Mich. 224), 211.
 Burk v. Hill (48 Ind. 52), 78.
 Burch v. Taylor (152 U. S. 634, 38 L. Ed. 578), 172.
 Burt v. Klixby (75 Mich. 311), 198.
 Burk v. Seeley (46 Mo. 334), 109.
 Burt v. Mason (97 Mich. 129), 225.
 Burton v. LeRoy (5 Sawy. 510), 105.
 Burton v. Shotwell (13 Buch. 271), 109.
 Bushman v. Faltis (184 Mich. 172), 18.
 Butler v. Bertrand (97 Mich. 50), 160.
 Butler v. Gale (27 Vt. 739), 78.
 Butler v. R. R. (85 Mich. 246), 94.
 Buxton v. Mason (120 Mich. 522), 216, 217.
- C
- Cain v. Masurette (196 Mich. 7), 242-244.
 Cameron v. Shumway (149 Mich. 634, 113, N. W. 287), 245, 252.
 Canton v. Irvine (194 Mich. 165), 122.
 Canon v. Farmers Bank (3 Neb. 348, 91 N. W. 585), 209.
 Carley v. Thompson (196 Mich. 713), 70.
 Carnell v. Norton (188 Mich. 187), 171.
 Carnell v. Norton (188 Mich. 191), 149.
 Carning v. Loomis (111 Mich. 23), 155.
 Carmichael v. Carmichael (72 Mich. 85), 19.
 Carpenter v. Dennison (208 Mich. 441), 79.
 Carley v. Gitchell (105 Mich. 38), 96.
 Carr v. Leavitt (54 Mich. 540), 13.
 Carroll v. Rice (Walk. Ch. 373), 214.

[References are to Sections]

- Carter v. Reaume (159 Mich. 160), 144.
 Carter v. Couch (84 Fed. 735), 216.
 Casgrain v. Hammond (134 Mich. 419), 79.
 Castle Creek Water Co. v. City of Aspen (146 Fed. 8), 258.
 Casset v. O'Riley (160 Mich. 101), 204.
 Cathcart v. Robinson (5 Pet. U. S. 264, 8 L. Ed. 120), 105.
 Chandler v. McKinney (6 Mich. 322), 98.
 Chaney v. Coleman (77 Tex. 100, 142 S. W. 370), 231.
 Chambers v. Livermore (15 Mich. 381), 105.
 Chapin v. Balles Iron Works (213 Mich. 515), 244.
 Cheney v. Belby (74 Fed. 52), 172.
 Cheney v. Cook (7 Wis. 413), 259.
 Chandler v. Graham (123 Mich. 327), 79.
 Chesborough v. Wizard Inv. Co. (156 Ky. 149, 160 S. W. 725), 251.
 Chicago Attachment Co. v. Davis S. M. Co. (142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754), 21, 62.
 Chicago, etc., R. R. Co. v. Lane (150 Mich. 162, 113 N. W. 22), 103.
 Chilton v. White (78 S. E. 1048, 72 W. Va. 545), 74.
 Churchill v. Morse (23 Iowa 229), 172.
 Charlet v. Trackle (197 Mich. 426), 121.
 Chute v. Quincy (156 Mass. 189, 30 N. E. 550), 110.
 Cilley v. Burkholder (41 Mich. 749), 20.
 Circuit Court Rules, 21, 24, 25.
 City of Marquette v. Iron Co. (132 Mich. 130), 43, 172.
 City of Houston v. Finnegan (Tex.) (85 S. W. 470), 74.
 Clark v. Rosario Mining & Milling Co. (176 Fed. 180, 99 C. C. A. 534), 106.
 Clark v. Johnson (214 Mich. 578), 197, 198, 203.
 Cleaves v. Walsh (125 Mich. 638, 84 N. W. 1108), 254.
 Cleveland v. Berger Bldg. & Imp. Co. (N. J. Eq., 55 Atl. 117), 186.
 Cleveland Refining Co. v. Dunning (115 Mich. 238), 16.
 Climer v. Haney (15 Mich. 22), 10.
 Clithero v. Fenner (122 Wis. 356, 99 N. W. 1027), 76.
 Close v. Stuyvessant (132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161), 78.
 Cochran v. Stoman (201 Mich. 639), 242.
 Cochrane Timber Co. v. Fisher (190 Mich. 478), 86.
 Coffee v. Newson (2 Ga. 422), 205.
 Cole v. Cole Realty Co. (169 Mich. 347, 36 Cyc. 686), 104.
 Cole v. Cole (41 Md. 301), 97, 109.
 Cole v. Judge (106 Mich. 692), 164.
 Coleman v. Floyd (131 Ind. 130), 186.
 Coleman v. Applegarth (68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. Rep. 284), 246.
 Coleman v. Appelgarth (68 Md. 21, 11 Atl. 284, 6 Am. St. Reps. 417), 253.
 Coles v. Trecothick (9 Ves. 234, 246), 23.
 Colgrove v. Solomon (34 Mich. 494, 499, 500), 10.
 Collingshead v. Morris (172 Mich. 127), 15.
 Colharin v. Knack (133 Mich. 335), 98.
 Colonna Dry Dock Co. v. Colonna (108 Va. 230, 61 S. E. 770), 106.

[References are to Sections]

- Columbine v. Cluchester (2 Phil C. 27), 109.
- Clark v. Hollman (204 Mich. 62), 18.
- Collier v. Coutts (92 Tex. 234, 47 S. W. 525), 76.
- Compau v. Compau (44 Mich. 31), 72.
- Compau v. Lafferty (50 Mich. 114), 79.
- Conley v. Finn (177 Mass. 70, 50 N. W. 460, 68 A. S. R. 399), 78.
- Converse v. Blumvch (14 Mich. 109, 90 Am. Dec. 230), 147.
- Conrad v. Long (33 Mich. 78), 151, 156.
- Connor v. Det. Term. R. R. (183 Mich. 241), 86.
- Connecticut Mut. Life Ins. Co. v. Wood (115 Mich. 254), 82.
- Cook v. Clinton (64 Mich. 309), 74.
- Cooper v. Pierson (212 Mich. 657), 15, 18.
- Copeland v. McAderly (100 Ala. 553), 78.
- Capper v. Brown (76 N. J. Eq. 406), 23.
- Corning v. Loomis (111 Mich. 23), 177.
- Coryell v. Hotchkiss (130 Mich. 400), 58.
- Corry v. Smalley (106 Mich. 260), 62, 216.
- Corning v. Loomis (111 Mich. 23), 15, 177.
- Cornell v. Crane (113 Mich. 460), 216.
- Corby v. Thompson (196 Mich. 706), 72.
- Corrigan v. Hinkley (125 Mich. 125), 82.
- Corrigan v. Ralph (265 Ill. 107, N. E. 155), 101.
- Coulter v. Lavinger (212 Mich. 272), 172.
- Courtney v. Ashcraft (105 S. W. 106, 31 Ky. Law Ry. 1324), 74.
- Covert v. Morrison (49 Mich. 133), 151, 156.
- Covada v. Diaz (37 Philippine Rep. 982), 250.
- Cowart v. Singletary (79 S. E. 196, 47 L. R. A. (N. S.) 621, 140 Anno.), 172.
- Cox v. Halkerboer (200 Mich. 86), 218.
- Cragg v. Holmes (18 Ves. 14, Note 12), 101.
- Craig v. Crossman (209 Mich. 463), 97.
- Crawford v. Cecattle (186 Mich. 270), 244.
- Crosby v. City of Greenville (183 Mich. 452), 74.
- Croskery v. Bush (116 Mich. 288), 82.
- Cross v. Buskirk-Rutledge Lbr. Co. (139 Tenn. 79, 201 S. W. 151), 78.
- Crooks v. Whitford (47 Mich. 286), 18.
- Crowder v. Searcy (103 Mo. 97, 15 S. W. 346), 231.
- Crump v. Berdan (97 Mich. 295), 145.
- Cue v. Johnson (85 Pac. 598, 73 Kans. 558), 150.
- Culver v. Avery (161 Mich. 323), 213.
- Cummings v. Lake Realty Co. (86 Wis. 382, 57 N. W. 431), 253.
- Cummings v. Dolan (52 N. W. 496, 100 Pac. 989), 78.
- Curran v. Rogers (35 Mich. 220, 221), 77, 256.
- Curry v. Curry (213 Mich. 316), 144.
- Curry v. Curry (213 Mich. 309, 39 Cyc. 1384), 24.
- Curtis v. Buckley (14 Kan. 449), 62.
- Curtis v. Abbott (39 Mich. 440, 441), 10, 20.
- Curtis v. Miller (184 Mich. 151), 145.
- Cutter v. Wait (131 Mich. 509), 209.

[References are to Sections]

D

- Daily v. Litchfield (10 Mich. 29), 145.
 Dakin v. Sokin (97 Mich. 284), 112.
 Daley v. Litchfield (10 Mich. 29, 36 Cyc. 706), 24, 43a.
 Dalton v. Mertz (197 Mich. 390), 43a.
 Darling v. Huff (175 Mich. 304), 27, 204.
 Darr v. Mummert (57 Neb. 378, 77 N. W. 767), 250.
 Darrah v. Kadison (55 Pa. Super. Ct., 335), 74.
 Darragh v. Vicknair (126 La. 171, 52 S. 264), 254.
 Davis v. Davis (163 S. W. 468, 157 Ky. 530), 74.
 Davis v. Freeman (10 Mich. 191), 145.
 Davis v. Godart (Minn., 154 N. W. 1091), 216.
 Davis v. Strobridge (44 Mich. 159), 145.
 Davison v. Hawkeye Ins. Co. (71 Ia. 532, 60 Am. Rep. 818, 32 N. W. 514), 23.
 Davison v. Peter (119 Mich. 610).
 Day v. Scott (153 Ill. 293, 38 N. E. 562), 208.
 Day v. Davey (132 Mich. 173), 79.
 Dayton v. Stone (111 Mich. 196), 96.
 Deitman v. Arnold (71 Mich. 656), 77.
 Deacons v. Doyle (75 Va. 258), 78.
 Decker v. Pierce (191 Mich. 71), 145.
 Defeenbaugh v. Foster (40 Ind. 382), 172.
 DeLaney v. Hawkins (49 N. Y. Supp. 469, 23 App. Div. 8, 57 N. E. 1108, 163 N. Y. 587), 74.
 Delano v. Taylor (Ky., 113 S. W. 888), 186.
 Delevan v. Wright (110 Mich. 143), 20.
 Demoss v. Robinson (46 Mich. 62), 10, 20.
 Denny v. Hancock (L. R. 6 Ch. App. 1), 110.
 Denton v. Stewart (1 Cox. 258), 109.
 Desvergers v. Willis (56 Ga. 515), 78.
 Detroit, Hillsdale & Ind. R. R. Co. v. Forbes (30 Mich. 165), 10.
 Detroit Land Contract Co. v. Green (202 Mich. 464), 60.
 Detroit v. Martin (34 Mich. 170), 64.
 Develan v. Duncan (49 N. Y. 485), 63.
 Dewitt v. Tyler (49 Mich. 614), 198.
 D. H. R. R. Co. v. Forbes (30 Mich. 175), 12.
 Dickinson v. Wright (56 Mich. 46), 10.
 Dikeman v. Arnold (71 Mich. 656, 40 N. W.), 219.
 Dilly v. Langwell (163 Mich. 439), 200.
 Dinnan v. Bloomfield Hills Land Co. (214 Mich. 53 and cases cited), 217.
 Disbrow v. Jones Har. (Mich. 102), 216.
 Dickerson v. Dickerson (Mo., 110 S. W. 760), 64.
 Doane v. Feathers Est. (119 Mich. 691), 19.
 Doland v. Smith (147 Mich. 276), 79.
 Dolee v. Ireland (9 Mich. 157), 160.
 Donahue v. Patter & G. Co. (63 Nebr. 128), 259.
 Donnelly v. Lyons (173 Mich. 515), 86, 171, 180.
 Donovan v. Word (100 Mich. 605), 71.
 Dougherty v. Randall (3 Mich. 581), 43.

[References are to Sections]

- Dowling v. Salliotte (83 Mich. 131, 135-136), 43.
- Downey v. Seib (185 N. Y. 427, 78 N. E. 66, 113 A. S. R. 926, 8 L. R. A. (N. S.) 49), 78.
- Draft v. Herselsweet (194 Mich. 604), 207.
- Dragoo v. Dragoo (50 Mich. 573), 20, 98.
- Dreger v. Budde (113 N. W. 950, 133 Wis. 516), 74.
- Driver v. Martin (60 S. W. 651, 68 Ark. 551), 74.
- Driver v. White (Tenn., 5 S. W. 994), 206.
- Drapers v. Marshall (26 Mich. 560), 18.
- Dubois v. Campau (28 Mich. 304), 72.
- Ducett v. Wolf (81 Mich. 312), 10.
- Dukes v. Turner (44 Ia. 575), 43.
- Dunks v. Fuller (32 Mich. 242), 58, 216.
- Dunner v. Gypsum Co. (153 Mich. 622), 12.
- Dupont v. Starring (42 Mich. 492), 70.
- Dwight v. Cutler (3 Mich. 573), 10, 20, 63.
- Dyer v. Duffy (39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339), 253.
- E
- Eaghus v. Pittus (109 Ark. 310, 1598 W. 1116), 254.
- Eaton v. Benton (2 Hill 576), 19.
- Eaton v. Trowbridge (38 Mich. 454), 64.
- Ebert v. Cullen (165 Mich. 75), 18.
- Eberly v. Heaton (124 Mich. 205), 198.
- Economy Power Co. v. Daskam (74 Mich. 402-404), 59.
- Edsell v. Nelins (80 Mich. 146), 64.
- Edwards v. Thawan (187 Mich. 361), 244.
- Eggleston v. Wagner (46 Mich. 618), 16.
- Eggers v. Anderson (63 N. Y. Eq. 264, 49 Atl. 578), 214.
- Eichelberger v. Barnitz (1 Yeates (Pa.) 307), 225.
- Elliott v. Walker (145 Ky. 71, 140 S. W. 51), 186.
- Ellison v. Branstrattor (45 Ind. App. 307, 88 N. E. 963, 89 N. E. 513), 186.
- Elterman v. Hyman (192 N. Y. 113, 127 Am. St. Rep. 862, 15 Anno. Cases 819), 186.
- Elder v. McClasky (17 C. C. A. 251, 70 Fed. 529), 70.
- Engel v. Engel (209 Mich. 276), 20.
- Ernest v. Ernest (178 Mich. 100), 86.
- Erslinger v. Pascoe (129 Ia. 86, 105 N. W. 362, 3 L. R. A. new series 147), 249.
- Ervingdale v. Riggs (148 Ill. 403), 20.
- Evans v. Taylor (177 Pa. St. 286, 35 Atl. 635, 69 L. R. A. 790), 78.
- Everett v. Mansfield (158 Fed. 374, 8 Anno. Cs. 956), 186.
- F
- Faraday Coke, etc. Co. v. Owens 26 Ky. Law Rep. 243, 80 S. W. 771), 186.
- Farday Coal Co. v. Owens (26 Ky. Law Rep. 243, 160 S. W. 725), 251.
- Farnum v. Brooks (9 Pick (Mass.) 212), 43.
- Farr v. Childs (204 Mich. 19), 226.
- Farr v. Childs (204 Mich. 20), 79.
- Farrell v. Taylor (12 Mich. 113), 164.
- Farwell v. Johnston (34 Mich. 342), 58.
- Faxton v. Faxton (28 Mich. 159), 19.

[References are to Sections]

- Felch v. Hooper (119 Mass. 52), 116.
 Feldman v. Zimmerman (208 Mich. 240), 162.
 Felkner v. Tighe (39 Ark. 357), 186.
 Felt v. Felt (118 N. W. 953, 155 Mich. 237), 107.
 Fenton v. Emblers (3 Burrow 1278), 19.
 Ferguson v. Wilson (L. R. 2 Ch. 77), 109.
 Fero v. Land & Sons Lbr. Co. (101 Mich. 310), 198.
 Ferres v. Snow (124 Mich. 559), 115.
 First Nat'l Bank v. Dana (79 N. Y. 112), 24.
 Fifth Nat'l Bank v. Pierce (117 Mich. 376), 198.
 Fisher v. Boody (1 Curt. 206 Fed. C. S. 4, 814), 231.
 Fitscher v. Olsen (115 Mich. 320), 71.
 Fitzhugh v. Maxwell (34 Mich. 138), 43, 173, 178, 186.
 Fitzgerald v. Boyle (Utah, 193 Pac. 1109), 248.
 Flading v. Rose (58 Md. 13), 43.
 Flattery v. James Cunningham Son & Co. (125 Mich. 467), 243.
 Fleming v. Burnham (100 N. Y. 1, 10), 78.
 Fleming v. James S. Holden Co. (200 Mich. 519), 244.
 Fleming v. Fleming (202 Mich. 615), 20.
 Flamer v. Cullen (194 Mich. 585), 121.
 Foley v. Dwyer (112 Mich. 591), 173, 178, 186.
 Folley v. Thomas (93 N. E. 181, 46 Ind. App. 559), 74.
 Folkner v. Beers (2 Doug. P. 117), 160.
 Foltz v. Wert (103 Ind. 404, 2 N. E. 950), 43.
 Ford v. Wright (114 Mich. 122), 77.
 Forney v. Birmingham (173 Ala 1, 55 So. 618), 257.
 Foreman v. Wolf (29 Atl. 837, Md.), 70.
 Fountain v. Semi Tropic Land Co. (99 Cal. 677, 34 Pac. 497), 231.
 Fouts v. Foudray (31 Okla. 221, Anno. Cases 1913 E. 301, 38 L. R. A. (N. S.) 251), 23.
 Fowler v. Breedan (98 Mich. 133), 160.
 Fowler v. Dr. Lance (146 Mich. 630), 20.
 Fox v. Pierce (50 Mich. 500), 226.
 Fowler v. Isbell (202 Mich. 572), 20, 112, 126.
 Francis v. Barry (69 Mich. 311), 18.
 Fray v. Austin Machinery Co. (140 Mich. 452), 172.
 Frazer v. Hovey (195 Mich. 160), 24, 112, 150.
 Freedman et al. v. Oppenheim (187 N. Y. 101, 79 N. E. 841, 116 A. S. R. 595), 78.
 Fred Macey Co. v. Macey (143 Mich. 138), 214.
 French v. Bent (43 N. H. 448), 219.
 Frost v. Leatherman (55 Mich. 33), 64.
 Friar v. Smith (120 Mich. 411), 243.
 Friedenwald v. Welch (174 Mich. 399), 242.
 Friendly v. Elwert (57 Ore. 599, 112 Pac. 1085, Anno. Cases 1913 A-357), 248.
 Friend v. Smith (191 Mich. 99), 95, 112.
 Frishkorn v. Fitzgerald (215 Mich. 106), 112.
 Fuller v. Swensberg (106 Mich. 305, 64 N. W. 463, 58 Am. St. Rep. 481), 72.

[References are to Sections]

- Fullerton v. McGurdy (4 Kans. 132), 109.
- G
- Gaskins v. Byrd (66 Fla. 432), 105.
- Garr v. Alden (139 Mich. 440), 214, 225.
- Garvey v. Parkhurst (127 Mich. 368), 18.
- Garrise v. Kars (201 Mich. 643), 244.
- Gates v. Paul (117 Wis. 170, 94 N. W. 55), 10, 15.
- Gates on Real Prop. (Sec. 598, Fourth L. R. A. N. S. 957, Secs. 614-A, 467, 657, 606, 613), 144.
- Gates v. McLaulin (199 Mich. 438), 112.
- Gates v. Gamble (53 Mich. 181), 96.
- Gault v. Starmont (51 Mich. 636), 18, 99.
- Gauthier v. West (45 Minn. 192), 63.
- Geiges v. Greiners (68 Mich. 153), 151.
- Gengrass v. Mather (128 Mich. 572), 14.
- George v. Schuman (202 Mich. 241, 242, 248, 258, 259, 168 N. W. 486), 108.
- Gerstell v. Shirk (210 Fed. 223, 127 C. C. A. 41), 186.
- Gettleson v. Lewis (206 Mich. 113), 244.
- Gibbs v. Minthline (175 Mich. 626), 106, 114.
- Gilbert v. Haire (43 Mich. 283), 214.
- Gilbert v. Williams (157 Mich. 226), 198.
- Gildea v. Warren (173 Mich. 28), 76.
- Gitson v. Yale Land Co. (212 Mich. 294), 209.
- Goddard v. Foster (17 Wall (U. S.) 1421), 24.
- Goddard v. Jeffries (51 L. J. Ch. 57), 110.
- Golden v. Carnett (154 Ky. 438, 157 S. W. 1076), 250.
- Goldberg v. Drake (145 Mich. 50, 108 N. W. 367), 18, 256.
- Goldman v. Rosenberg (116 N. Y. 78, 15 Am. St. Rep. 410, 22 N. E. 397), 23.
- Good v. Jarrard (93 S. C. 43, L. R. A. 383), 23.
- Goodrich v. Smith, 78 Mich. 1), 225.
- Goodman v. Wobig (216 Mich. 51), 112.
- Goodwin v. Springer (233 Ill. 229, 84 N. E. 234), 106.
- Goodspeed v. Dean (12 Mich. 352), 150.
- Gordan v. McGinnis (92 Mich. 97), 198.
- Gordan v. Twp. of Burleigh (153 Mich. 493), 64.
- Gould v. Murch (70 Me. 288, 35 Am. Rep. 325), 23.
- Graham v. Moffett (119 Mich. 303), 225.
- Graybill v. Brugh (89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133), 248.
- Grand Trunk v. Fuller (205 Mich. 486), 79.
- Grand Rapids R. Co. v. Stevens (145 Mich. 646), 204, 206.
- Graves v. Stander (Okla., 161 Pac. 239), 186.
- Gray v. Mill (105 Mich. 189), 114.
- Green v. Reeder (199 Mich. 594), 121.
- Gregory v. Knight (50 Mich. 61), 78.
- Greeley v. Stellison (27 Mich. 153), 12.
- Greenberg v. Schwinski (211 Mich. 505), 242.

[References are to Sections]

- Green v. Mich. C. R. R. Co. (168 Mich. 109), 233.
- Green v. Railroad (158 Mich. 436), 112.
- Greenaway v. Adams (12 Ves. 395, 400), 109.
- Green v. Begole (70 Mich. 602), 96.
- Green vs. Bay City R. Co. (152 Mich. 436), 109.
- Gregg v. Hamilton (12 Kans. 333), 109.
- Green Bay City v. Port Huron R. Co. (156 Mich. 436), 109, 114.
- Green v. Grant (134 Mich. 466), 145.
- Greenop v. Wilcox & Hyatt (85 Mich. 49), 178.
- Greiling v. Watermalen (128 Wis. 440, 107 N. W. 339), 211.
- Griffith v. Spratley (1 Cox C. C. 383, 29 Eng. Rep. 1213), 105.
- Grueler v. McRoberts (48 Mich. 316), 160.
- Grunnett v. Gingras (77 Mich. 360), 116.
- Grunow v. Salter (118 Mich. 148), 14.
- Grover v. Buck (34 Mich. 519), 14.
- Groopers v. Marshall (206 Mich. 560), 18.
- Guild v. Atkinson R. R. (57 Kans. 70, 51 Ann., 33 L. R. A. 77), 109.
- Gunther (Geo.) Jr. Brewing Co. v. Brywczynski (107 Md. 696, 69 Atl. 514), 106.
- Gupton v. Gupton (47 Mo. 37), 109.
- Gustin v. Davis (129 Ind. 472), 10.
- Guyer v. Warren (175 Ill. 328), 248.
- H
- Hack v. Norris (46 Mich. 587), 218.
- Haener v. McKenzie (188 Mich. 27), 213.
- Haff v. Jenney (54 Mich. 511), 231.
- Hager v. Rey (213 Mich. 664), 121.
- Hall v. Bell (143 Wis. 296, 177 N. W. 967), 215.
- Halcomb v. Noble (69 Mich. 398), 213.
- Haldane v. Sweet (55 Mich. 196), 215.
- Hallett v. Middleton (1 Rus. 243), 109.
- Hamberger v. Berman (203 Mich. 78), 216.
- Hamberger v. Thomas (Texas Civil Appeals, 118 S. E. 770), 250.
- Hammer v. Martin (205 Mich. 359), 207, 212.
- Hammond v. Hannin (21 Mich. 374), 219.
- Hammond v. Wallace (85 Calif. 522, 24 Pac. 837), 216.
- Hanaw v. Bailey (83 Mich. 27), 162.
- Hanley v. Waterson (39 W. Va. 214, 19 S. E. 536), 246.
- Hannan v. Prentis (124 Mich. 417), 243.
- Hardin v. Boyd (113 U. S. 765, 28 L. Ed. 1144), 43.
- Harrett v. Kinney (44 Mich. 457), 151.
- Harrington v. Brewer (56 Mich. 301), 198.
- Harrington v. Paterson (124 Calif. 542, 57 Pac. 476), 216.
- Harris v. Brown (172 Mich. 164-172), 19, 43.
- Harrison v. Des Moines (91 Iowa 114), 78.
- Harrison v. Eassom (208 Mich. 685), 20, 122.
- Hauber v. Liebold (76 Nebr. 706, 107 Adms. 78), 43.
- Haughton v. Murphy (22 N. J. Ed. 531, 21 N. J. Ed. 118), 109, 186.
- Haviland v. Chase (116 Mich. 216), 152.

[References are to Sections]

- Haynes v. Stevens (11 N. H. 28), 78.
- Haynes v. Young (36 Me. 557), 78.
- Hazelton v. De Luc (10 App. Cases D. C. 379), 250.
- Head v. Fordyce (17 Cal. 149), 64.
- Healy v. Worth (35 Mich. 166), 54.
- Heaton v. Edwards (90 Mich. 500), 244.
- Hedderly v. Johnson (42 Minn. 443, 44 N. W. 1056), 78.
- Heethuis v. Kerr (194 Mich. 689), 86.
- Heith v. Smith (175 Mich. 328), 112.
- Harrison v. Spencer (110 Mich. 215), 76.
- Hartz v. Railway (153 Mich. 33), 94.
- Heller v. Cohen (154 N. Y. 299, 306), 78.
- Hemmer v. U. S. (204 Fed. 898), 214.
- Hendricks v. Rasson (42 Mich. 104), 152.
- Henry v. Gregory (29 Mich. 68), 152.
- Henry v. Henry (80 N. W. 800, 122 Mich. 6), 74.
- Herman v. Somers (158 Pa. St. 424, 27 Atl. 1050, 38 A. S. R. 851), 78.
- Herrick v. Moore (19 Me. 313), 78.
- Hibbard v. Hatch Storage Co. (174 Mass. 297), 15.
- Hickey v. Dale (66 N. H. 336), 15.
- Hickman v. Cheney (152 Mich. 217, 155 Mich. 217 (255), 118 N. W. 993), 10, 15, 177, 183.
- Hicks v. Turck (72 Mich. 311), 97, 104, 113.
- Hicks v. Smith (183 Mich. 137), 77.
- Hickson v. Aylward (3 Moll 15), 43.
- Higgins v. Butler (78 Me. 520, 7 Atl. 276), 105.
- Higney v. Swan (111 Mich. 161), 144.
- Hildebrand v. Nippeling (40 Mich. 646), 10.
- Hilberg v. Greer (172 Mich. 505, 138 N. Y. 201, 249), 18.
- Hiles v. Fisher (144 N. Y. 306), 43.
- Hill v. Carter (111 Mich. 158), 177.
- Hillier v. Carpenter (216 Mich. 594), 212.
- Hitchcock v. Moiner (111 Mich. 80), 86.
- Hodson v. Van Fassen (26 Mich. 68), 152.
- Hogle v. Mayering (161 Mich. 472), 243.
- Hogsett v. Ellis (17 Mich. 364-5), 10, 20.
- Hokonson v. Oatman (165 Mich. 512), 212.
- Holland v. Holland (195 Mich. 513), 18.
- Holland v. Hoyt (14 Mich. 242), 10.
- Hollander v. Central Metal & Supply Co. (71 Atl. 442, 23 L. R. A. (N. S.) 1135), 116.
- Hollingshead v. Morris (172 Mich. 126), 106, 113, 114.
- Holmes Realty Co. v. Silcax (195 Mich. 59), 242.
- Holmes v. Soule (180 Mich. 527), 86.
- Holtzman v. Douglas (5 App. D. C. 397, 168 U. S. 278), 74.
- Hommel v. Devinney (39 Mich. 523), 58, 116.
- Hoodley v. Sav. Bank (Conn., 44 L. R. A. 321), 244.
- Horgan v. Russell (24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150), 244, 256, 257.
- Horton v. Hubbard (83 Mich. 123), 115.

[References are to Sections]

Horton v. Helmholtz (149 Mich. 227), 79.

House v. Jackson (24 Ore. 89, 32 Pac. 1027), 251.

Howard v. Linnhaven Orchard Co. (228 Fed. 523), 186.

Howe v. Benedict (142 N. W. 768), 107.

Howe v. Coats et al. (97 Minn. 385, 107 N. W. 397, 114 A. S. R. 723, 4 L. R. A. (N. S.) 1170), 78.

Howell v. Northampton (211 Pa. St. 284), 78.

Hoyes v. Livingston (34 Mich. 388), 14.

Hubbard v. Norton (10 Conn. 422), 78.

Hubbardson Lbr. Co. v. Bates (31 Mich. 158), 216.

Hubbel v. Ohler (213 Mich. 664), 185-A, 121.

Hughes v. Pealer (80 Mich. 540), 198.

Hummill v. Smale (186 Mich. 199), 86.

Hunkabee v. Shepard (95 Ala. 342), 251.

Hunt v. Stevens (174 Mich. 501), 86.

Hunter v. Blasser (194 Mich. 157), 244.

Hunter Tract Imp. Co. v. Stone (58 Wn. 661, 109 Pac. 112), 172.

Huron Land Co. v. Robarge (128 Mich. 686), 18.

Hutchinson v. Westbrook (191 Mich. 484), 204, 213.

Huych v. Andrews (113 N. Y. 81), 78.

Hynes v. Estey (116 N. Y. 501), 78.

Hyde v. McFaddin (140 Fed. 433, 72 C. C. A. 655), 74.

I

Ickler v. Muellen (196 Mich. 616), 95, 114, 122.

Ide v. Leister (10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695), 248, 259.

Ihrke v. Continental Life Ins. & Inv. Co., 91 Wn. 342, L. R. A. 1916 F. 430, 157 Pac. 866), 186.

Ill. Steel Co. v. Bilot (85 N. W. 402, 109 Wis. 418, 83 Am. St. Rep. 905), 74.

Irving v. Campbell (121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620), 78.

J

Jackson v. Evans (44 Mich. 510), 10.

Jackson v. Lever (3 Bro. C. C. 605), 23.

Jackson v. Groat (N. Y. 1847), (7 Cow. 285), 186.

Jackson v. Armstrong (50 Mich. 65, 14 N. W. 702), 210, 213.

Jacobs v. Miller (50 Mich. 119), 43.

Jacobson v. Le Grange's Ex'rs (3 John 199), 19.

James v. Jenkins (34 Md. 1), 78.

Jandorf v. Patterson (90 Mich. 40), 212, 218, 231.

Jaquith v. Hudson (5 Mich. 126), 145.

Jarvis v. Smith (Hoff. Ch. 470), 21, 62.

Jaspa v. Martin (161 Mich. 336), 73.

Jeffries v. Johnson (175 S. W. (Mo.) 581), 74.

Jeffrey v. Hursh (42 Mich. 563), 151.

Jenkinson v. Aud. Gen. (104 Mich. 34), 82.

Jennings v. Sherwood (8 Conn. 127), 24.

[References are to Sections]

- Jilson v. Gilbert (26 Wis. 637), 19.
 John v. McNeal (167 Mich. 148), 97,
 144.
 John v. McNeil (167 Mich. 151),
 144, 171.
 Johnson v. Moore (28 Mich. 3), 12.
 Johnson v. Bowden (37 Tex. 621),
 109.
 Johnson v. Eklund (72 Minn. 195),
 172, 186.
 Johnson v. Wilson (11 Mich. 114),
 198.
 Johnson v. Trippe (33 Fed. 530),
 258.
 Jones v. Berkey (181 Mich. 472),
 111.
 Jones v. Bowling (117 Mich. 288),
 171, 179.
 Jones v. Berkey (181 Mich. 476),
 172, 186.
 Jordan v. Eve (31 Gratt (Va.) 1),
 78.
 Joy v. Stevenson (128 Pac. 751),
 172.
 Junction R. Co. v. Pa. Co. (222 Pa.
 573, 72 Atl. 271), 186.
 Justice v. Button et al. (89 Neb. 367,
 131 N. W. 736, 38 L. R. A. (No.)
 1), 78.
- K
- Kalkes v. Storms (93 Mich. 480),
 152.
 Kares v. Covell (180 Mass. 206),
 78.
 Karmichael v. Karmichael (72
 Mich. 76), 20.
 Kast v. Bender (25 Mich. 515), 209.
 Kansas Land Co. v. Hill (Tenn., 11
 S. W. 797), 218.
 Kellogg v. Ingersoll (2 Mass. 96),
 78.
 Kellogg v. Malin (50 Mo. 496), 78.
- Kellow v. Jary (141 Pa. St. 144, 22
 Atl. 522), 246, 251.
 Kelly v. Kelly (54 Mich. 30), 10.
 Kelsey v. Crawther (162 U. S. 404),
 255.
 Kelsey v. McDonald (76 Mich. 188),
 20.
 Kendall v. Chase (203 Mich. 660),
 121.
 Kenney v. Wexhan (6 Madd. 355,
 357), 23.
 Kennedy v. Ford (183 Mich. 48),
 151.
 Kerwin Machine Co. v. Baker (199
 Mich. 122), 24, 112.
 Killeen v. Funk (83 Neb. 622), 78.
 Kimberlin v. Templeton (55 Ind.
 App. 155, 102 N. E. 160), 23.
 Kicks v. Smith (183 Mich. 37), 77.
 King v. Carpenter (159 Mich. 337),
 43, 79.
 Kingsbury v. Burnside (58 Ill. 310),
 10.
 Kinsey v. Barth (192 Mich. 219),
 244.
 Kinyon v. Cunningham (146 Mich.
 430), 200.
 Kimball v. Harrington (91 Mich.
 281), 198.
 Kimball v. Ronney (122 Mich. 160),
 243.
 Kirby-Sorge-Felske Co. v. Doty
 (190 Mich. 533), 243.
 Kirkpatrick v. Miller (50 Miss.
 521), 155.
 Kittermaster Exr., etc. v. Brossard
 (105 Mich. 220), 145.
 Klett v. Klett (175 Mich. 224), 20.
 Knapp v. Gambsy (47 Mich. 377),
 164.
 Knight v. Cooley (34 Iowa 218),
 10, 15.

[References are to Sections]

- Knite v. Lage (152 Mich. 638, 639).
 Koch v. Strenter (232 Ill. 594, 83 N. E. 1072), 106.
 Krankfeld v. Missal (87 Conn. 491), 209.
 Krell v. Cohen (214 Mich. 590), 59.
 Kroll v. Diamond Match Co. (113 Mich. 196), 18.
 Krenze v. Solomon (126 Mich. 290), 64.
 Krueger v. Market (145 N. W. 30, 124 Minn. 393), 74.
 Kreutzer v. Lynch (122 Wis. 474, 100 N. W. 887), 252.
 Kulesza v. Wychomski (213 Mich. 189), 207.
 Kutz v. McKune (22 Wis. 628), 78.
- L
- Lake Erie Land Co. v. Chylinski (197 Mich. 216), 77, 98, 106, 114.
 LaBlanch v. Perron (209 Mich. 239), 198, 203.
 Lachelt v. McInerney (125 Mich. 413), 86.
 LaFountain v. Dee (110 Mich. 347), 74.
 Lamb v. Hinman (46 Mich. 116), 20.
 Lamb v. Danforth (59 Mich. 322), 78.
 Lambert v. Weber (83 Mich. 395), 18, 58, 114, 115, 116.
 Lamkins Loan & Investment Co. v. Adams (132 Mich. 350), 144.
 Langworth v. Mitchell (26 Ohio St. 334), 253.
 Lapp v. Lapp (43 Mich. 287), 199.
 Larmon v. Jordan (56 Ill. 204), 246, 253.
 Laser v. Fowler (114 Ark. 874), 208.
 Lasley v. Kniskern (152 Mich. 244), 74.
 Laubengayer v. Rhode (167 Mich. 605), 109.
 Lavin v. Lynch (203 Mich. 145), 62.
 Law v. McKechnie (202 Mich. 284), 122.
 Leavitt v. Stern (159 Ill. 526, 42 N. E. 869), 62.
 Lecus v. Turns (180 Mich. 117), 86.
 Lee v. Butler (167 Mass. 426), 15.
 Lee v. Timkin (10 Ap. Div. 213, 41 N. Y. Supp. 979), 215.
 LeFevre v. Chamberlain (228 Mass. 294, 117 N. E. 327), 214.
 Legg v. Brower (212 Mich. 403), 82.
 Leigen v. Rosier (200 Mich. 328), 114.
 Lenmon v. Jones (222 U. S. 51, 56 L. Ed. 89), 172.
 Lergen v. Rayser (200 Mich. 328), 43.
 Lesser v. Smith (212 Mich. 559), 204.
 Lewis v. Jacobs (153 Mich. 665), 205.
 Lewis v. Hawkins (90 U. S. (23 Wall) 119, 23 L. Ed. 113), 43.
 Levendge v. Huritz (111 Mich. 618), 104.
 Levy v. Roth (39 N. Y. Supp. 1057, 17 Misc. Rys. N. Y. 40), 251.
 Lieberman v. Sloman (118 Mich. 355), 226.
 Lightfoot v. Head (60 So. 752, 64 Fla. 364), 74.
 Lake Shore etc. Ry. Co. v. Serling (189 Mich. 366), 76.
 Lion v. Henry Bradford & Co. (209 Mich. 172), 213, 219, 236.
 Lister v. Sokwinski (206 Mich. 121), 243.
 Little v. Thurston (55 Me. 86), 109.

[References are to Sections]

- Little v. Needham (39 Mich. 147), 10.
 Little v. Dawson (4 Dall. 111), 19.
 Litz v. Goosling (93 Ky. 185, 19 S. E. 527, 21 L. R. A. 127), 259.
 Lockerby v. Amon et al. (64 Wn. 24), 172.
 Loetz v. Tierney (153 Mich. 279, 281, 282), 141, 151.
 Logan v. Anderson (2 Doug. 100), 14.
 Lombton v. Investment Co. (132 Mich. 353), 151.
 Longcar v. Turner (191 Mich. 240), 86.
 Loomis v. Loomis (178 Mich. 221), 22.
 Loomis v. R. R. Co. (17 Fed. 301), 62.
 Lorman v. Benson (8 Mich. 18), 94.
 Latta v. Hax (219 Pa. St. 483, 68 Atl. 1016), 106.
 Louder v. Burch (47 Mich. 111), 145.
 Louisville Ry. Co. v. Ohio Imp. Co. (57 Fed. 42) 214.
 Louisville Ry. Co. v. Kellner-Dehler Realty Co. (148 Ky. 765, 147 S. W. 424), 110.
 Lovejoy v. Potter (60 Mich. 95), 116.
 Lverage v. Shurtz (111 Mich. 618), 97.
 Loveridge v. Coles (72 Mich. 57, 74 N. W. 1109), 218.
 Lowe v. Maynard (Ky., 115 S. W. 214), 186.
 Lowrie v. Gourlay (112 Mich. 641), 171.
 Lozon v. McKay (203 Mich. 364), 97, 122, 171, 174, 183, 185-A.
 Lumber Co. v. Ion (101 Mich. 577), 24.
 Lumbering Co. v. Powell (120 Mich. 58), 54.
 Lyle v. Munson (213 Mich. 250), 18, 121, 143.
 Lyons v. Fairmont Real Est. Co. (77 S. E. 525, 77 S. E. 525, 71 W. Va. 754), 74.
 Lyman v. Gedney (114 Ill. 386), 18.
 Lyman v. Robinson (96 Mass., 14 Allen 242), 15.
- M
- Macey (Fred) & Co. v. Macey (143 Mich. 138), 214, 215.
 Macreth v. Symmons (15 Ves. 329), 62.
 Maddock v. Russel (109 Calif. 417, 42 Pac. 139), 219.
 Malliott v. Vogel (125 Mich. 291), 79.
 Mammaux v. Cape May Co. (214 Fed. 757), 209.
 Manning v. Drake (1 Mich. 34), 226.
 Manley v. Johnson (85 Vt. 262, 81 Atl. 919), 209.
 Mansfield v. Sherman (81 Me. 365, 17 Atl. 300), 110.
 Manning v. British Ins. Co. (123 Mo. App. 456, 99 S. W. 1095), 23.
 Martin v. Morgan (87 Cal. 203, 25 Pac. 350, 22 Am. St. Rep. 240), 255.
 Martin v. Ash (20 Mich. 166), 216.
 Margo Coal Co. v. Holderman (Mo. 163 S. W. 828), 216.
 Marshall v. Lewis (4 Litt (Ky.) 140), 225.
 Marshall v. New Rochelle Co. (162 N. Y. 599, 57 N. E. 1117), 216.
 Martin v. Smith (94 Ore. 132), 172.
 Martin v. Wright Admrs. (13 Wend. 460), 19.
 Martin v. Lloyd (94 Cal. 195), 18.

[References are to Sections]

- Marks v. Tichenor (85 Ky. 536, 4 S. W. 225), 23.
- Marian v. Wolcott (68 N. J. Eq. 20), 23.
- Marsh v. Bristol (63 Mich. 378, 386, 390), 144.
- Marsh v. Breen Iron Co. (181 Mich. 222), 71.
- Marvin v. Hartz (130 Mich. 26), 172.
- Marussa v. Timerowski (204 Mich. 271), 24, 120.
- Maryland v. B. & O. R. R. (44 U. S. (3 How.) 534, 11 L. Ed. 714), 145.
- Mason v. Armitage (13 Ves. 25), 110.
- Mather v. Barnes (C. C., 146 Fed. 1000), 204, 211, 213.
- Match v. Hunt (28 Mich. 1), 204, 211, 213.
- Mathews v. Nash (151 Ia. 125, 130 N. W. 796), 43.
- Matterson v. Schoffield (26 Wis. 671), 10.
- Matterson v. Schoffield (27 Wis. 671), 10.
- Matta v. Kippola (102 Mich. 117), 43a.
- May v. Getty (140 N. C. 310, 53 S. E. 75), 254.
- Maynard v. Brown (41 Mich. 298), 18.
- Maynard v. Davis (127 Mich. 571), 77.
- Mayday v. Roth (160 Mich. 190), 144.
- Mead v. Hein (28 Wis. 533, 537), 78.
- Meidling v. Trefz (48 N. J. Eq. 638, 23 Atl. 824), 254.
- Meigs v. McFarlane (72 Mich. 194), 173.
- Memmer v. U. S. (204 Fed. 898), 215.
- Memmert v. McKeen (112 Pa. St. 315), 78.
- Mendelsohn v. McDonald (29 Mich. 96), 173.
- Meritas v. Farley (147 N. Y. Supp. 503), 212.
- Merchants Natl. Bank v. Soesbee (138 Ia. 354), 43.
- Merlan v. Kazoo Cir. Judge (180 Mich. 393), 213.
- Merchants Bank v. Evans (51 Mo. 335), 64.
- Merrill v. Kalamazoo (35 Mich. 211), 94.
- Merrill v. Wilson (66 Mich. 232), 214, 231.
- Merritt v. Westerman (180 Mich. 449), 74.
- Mestler vs. Jeffries (145 Mich. 598), 216.
- Meyers v. Stone (128 Va. 10, 102 N. W. 507, 111 Am. St. Rep. 180, 5 Anno. Cases 912), 252.
- Meyer v. Madreperla (68 N. J. L. 258, 53 Atl. 477, 96 A. S. R. 536), 78.
- Mich. Cir. Ct. Rule No. 21, 233.
- Mich. Cir. Ct. Rule No. 22, 234.
- Mich. Land & Iron Co. v. Thoney (89, Mich. 231), 151, 155, 147, 156.
- Michie v. Ellair (54 Mich. 518), 58.
- Midland Co. Sav. Bank v. Proaty (158 Mich. 156), 173.
- Midland Co. Sav. Bank v. Proaty (158 Mich. 656), 173.
- Mier v. Hadden (148 Mich. 488-492, 111 N. W. 1040, 118 Am. St. Rep. 586), 54.
- Milburn v. Moatsch (211 Mich. 644), 218, 226, 231.
- Miller v. Vorhies (115 Mich. 356), 204, 212.
- Miller v. Andrews (175 Mich. 351), 209, 211.
- Millard v. Truax (47 Mich. 252), 145.
- Mills v. Drueke Co. (172 Mich. 394), 171.

[References are to Sections]

- Milwaukee v. Strange (65 Wis. 178), 183.
- Miller v. Reeves (1 Mich. 110), 12.
- Miller v. Bearslee (175 Mich. 175), 18.
- Miles v. Shreve (179 Mich. 671), 16.
- Miller v. Smith (140 Mich. 524), 24.
- Miner v. Dickey (140 Mich. 518, 103 N. W. 855), 147.
- Minero v. Ross & Masterson (138 S. W. 224), 116.
- Miner v. Husted (191 Mich. 41), 145.
- Miner v. O'Harrow (60 Mich. 91), 20.
- Minor v. Brown (133 N. Y. 308), 43.
- Miscotten v. Helenthal (162 Mich. 402), 79.
- Miss. etc. R. R. Co. v. Cromwell (91 U. S.), 105.
- Maday v. Roth (160 Mich. 289), 144, 176.
- Moffett v. Ore. & C. R. R. Co. (80 Pac. 489, 46 Ore. 443), 150.
- Moore v. Meade (213 Mich. 597), 243.
- More v. Carighetti (228 Ill. 143), 172.
- Moore v. Provost (205 Mich. 687), 79, 94.
- Moore v. Kenosha Tp. (75 Mich. 332), 58.
- Moore v. Hinkle (50 N. 822, 151 Ind. 343), 74.
- Moore v. Williams (115 N. Y. 585, 22 N. E. 233, 12 A. S. R. 844, 5 L. R. A. 654), 78.
- Moore v. Gilbert (175 Fed. 1, 90 C. C. A. 141), 46.
- Moody v. McComber (158 Mich. 610), 79.
- Moon v. McKinstry (107 Mich. 668), 212.
- Morgan v. Zanger (188 Mich. 212), 244.
- Morgan v. Forbes (Mass., 128 N. E. 792), 245.
- Morman v. Harrington (118 Mich. 623), 213.
- Morgan v. Morgan (2 Wheat. 297), 115.
- Morgan v. Patt (101 S. W. 717, 124 Mo. App. 371), 74.
- Morris v. Vyse (154 Mich. 253), 228.
- Morris v. Hoyt (11 Mich. 9), 115, 183.
- Morrison v. Semer (164 Mich. 211), 82.
- Morrison v. Meister (212 Mich. 516), 122.
- Morris v. Aud. Genl. (143 Mich. 610), 79.
- Morris v. Summer (164 Mich. 208), 79.
- Morussa v. Timerowski (204 Mich. 271), 197, 198.
- Morse v. Hewett (28 Mich. 481), 18.
- Mossie v. Cyrus (61 Ore. 17, 119 Pac. 485), 254.
- Mueller v. Nortman (116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997), 257; (116 Ill. 468, 96 Am. St. Rep. 997, 93 N. W. 539), 186.
- Mulder v. Cartlett (54 Mich. 80), 164.
- Mull v. Smith (132 Mich. 618), 16.
- Munch v. Schable (37 Mich. 166), 105.
- Munro v. Edward (86 Mich. 91), 18.
- Murphy v. McIntyre (152 Mich. 591), 179; (116 N. W. 197), 147, 171.

[References are to Sections]

- Murphy v. Reid (125 Ky. 585, 101 S. E. 964, 128 Am. St. Rep. 259, 10 L. R. A. new series 195, 27 Ruling Case Law 338), 248.
- Murray v. Hudson (65 Mich. 670), 74.
- Myer v. Hart (40 Mich. 523), 145.
- Myers v. Mayhew (32 App. D. C. 205), 74.
- McArthur v. Newhall (106 Mich. 284), 200.
- McCredie v. Buxton (31 Mich. 383), 226.
- McCredie v. Nicholson (213 Mich. 551), 244.
- McCully v. Rivers (203 Mich. 417), 243.
- McClurken v. Decrick (33 Ill. 349), 96.
- McCook v. Crawford (40 S. E. 225, 114 Ga. 337), 74.
- McCaugh v. Young (37 So. 839, 85 Miss. 277), 74.
- McDonald v. Andrews (199 Mich. 161), 171, 176.
- McDowell v. Mecaster Circuit Judge (178 Mich. 103), 86.
- McCrilles v. Sutton (207 Mich. 58), 121.
- McDonald v. Bewick (51 Mich. 80), 96.
- McDonald v. Waltz (78 Mich. 685), 10.
- McDermott v. French (15 N. J. Eq. 48), 43.
- McElvoy v. Buch (35 Mich. 434), 15.
- McEwan v. Ortman (34 Mich. 324-325), 10, 14.
- McFerran v. Taylor (3 Cranch (U. S.) 270, 29 Amer. & Eng. Ency. 810), 24.
- McGovern v. Vennett (146 Mich. 558), 244.
- McGraw v. Muma (164 Mich. 120), 199.
- McGregor v. Putney (75 N. H. 113, 71 Atl. 226, Anno. Cases 1912, 1913), 172.
- McGinley v. Mining Co. (121 Mich. 88), 82.
- McHenry v. Hazard (45 N. Y. 570), 214, 215.
- McKenzie v. Call (176 Mich. 198), 231.
- McKee v. Wilcox (11 Mich. 358), 58.
- McLennon v. Prentice (85 Wis. 427, 434), 78.
- McMurtrie v. Bennette (Har. Ch. (Mich.) 124), 95.
- McMillan v. Schneider (147 Mich. 263), 43.
- McVicker v. Filer (31 Mich. 304), 71.
- N
- Nally v. Reading (107 Mo. 350, 17 S. W. 978), 21.
- Nason v. Chicago etc. R. R. Co. (149 Ia. 608, 128 N. W. 854), 43.
- Nelson v. Breitenwischer (194 Mich. 30), 59, 196a.
- Nelson v. Smith (161 Mich. 363), 147.
- Newberry v. Chicago Lbr. Co. (154 Mich. 84), 12.
- Newman v. Adelsperger (206 Mich. 683), 244.
- Nichols v. Burcham (177 Mich. 601), 18.
- Nicholson v. Aranson (48 Pac. 917, 58 Kan. 814), 74.
- Nickerson v. Nickerson (209 Mich. 134), 20, 121.
- Niemeta v. Teakkle (210 Mich. 590), 97, 121.
- Nims v. Sherman (43 Mich. 45-50-51), 10, 12, 151.
- Nolon v. Swift (111 Mich. 56), 242.
- North Pac. R. R. Co. v. Concannon (75 Wn. 591, 135 Pac. 652), 76.
- Norris v. Hay (149 Cal. 695, 87 Pac. 380), 210.

[References are to Sections]

- Nowicki v. Kopelczak (195 Mich. 678), 18, 95, 121.
- O
- Oakman v. Esper (206 Mich. 315), 122.
- O'Connor v. Huggins (113 N. Y. 521), 70.
- Offcutt v. Offcutt (67 Atlanta 138), 95.
- Ogooshevitz v. Wangas (203 Mich. 666), 97, 112.
- Ogooshevitz v. Arnold (197 Mich. 203), 16, 99.
- Ogooshevitz v. Sampson (211 Mich. 180), 16, 61.
- O'Herlihy v. Hedges (1 Schoales & L. 123), 21.
- Olcott v. Hermans (10 N. Y. Sup. Ct. Rep. 436, 3 Hem. 436), 172.
- Old 2nd Nat'l Bank v. Savings Bank (115 Mich. 533), 172.
- Old 2nd Nat'l Bank v. Savings Bank (115 Mich. 553), 144.
- Old 2nd Nat'l Bank of Bay City v. Alpena County Savings Bank (115 Mich. 548), 177, 187.
- Olin v. Henderson (120 Mich. 149), 156.
- Omaha v. Standard Oil Co. (55 Neb. 337, 75 N. W. 859), 172.
- Oman v. Bedford (134 Fed. 64), 64.
- Ortman v. Plummer (52 Mich. 76), 62.
- Osterhaub Lbr. Co. v. Rice (93 Mich. 353), 198.
- Otis v. Payne (86 Tenn. 663), 10.
- P
- Packard v. Johnson (57 Calif. 180), 70.
- Paine v. Skinner (8 Ohio 159), 70.
- Painter v. Lebanon Land Co. (164 Mich. 260), 213, 215.
- Palmer v. Marquette Mill Co. (32 Mich. 274), 15.
- Paldi v. Paldi (95 Mich. 410), 151.
- Palmer v. Williams (24 Mich. 331), 10.
- Parker v. Copland (4 Mich. 528), 164.
- Parsons v. Det. & M. Ry. Co. (122 Mich. 462), 209.
- Patton v. Quarrier (18 W. Va. 447), 78.
- Patterson v. Patterson (13 Johns 379), 19.
- Patron Fire Ins. Co. v. Pagenkoff (213 Mich. 158), 204.
- Patterson v. Arthurs (9 Watts (Pa.) 152), 78.
- Parkyn v. Ford (194 Mich. 184), 216.
- Paschal v. Hudson (Tex., 169 S. W. 911), 231.
- Pasterno v. Langwell (163 Mich. 439), 200.
- Paul v. Graham (193 Mich. 447), 242.
- Paulus v. Reed (121 Ia. 224, 96 N. W. 757), 43.
- Paund v. Clum (204 Mich. 28), 210, 212.
- Penfield v. Schleicher (215 Mich. 664), 114.
- Pearce v. Bastable (L. R. Ch. 122, 125), 119.
- Pearce v. Wore (94 Mich. 321), 226.
- Peay v. Capps (27 Ark. 160), 155.
- Peckham v. Balch (49 Mich. 179), 96.
- Pearson v. Gardner (202 Mich. 360), 112, 121, 144.

[References are to Sections]

- Pearson v. Adams (29 S. O. 977, 127 Ala. 157), 74.
- Pearson v. Horne (139 Ga. 453, 77 S. E. 387), 258.
- Peckham v. Walsh (49 Mich. 179), 20.
- Pendergost v. Pendergost (206 Mich. 526), 20, 112.
- Pence v. Miller (140 Mich. 205), 71.
- Pendhill v. Union Mining Co. (64 Mich. 172), 64.
- Peele v. Chener (Mass., 8 Allen 89), 76.
- Peters v. Fisher (50 Minn. 331), 164.
- Peters v. Canfield (74 Mich. 498), 176.
- Perkins v. Nugent (45 Mich. 146), 152.
- Perry v. Boyd (126 Ala. 162, 28 South 711), 215.
- Perkins v. Hadsell (50 Ill. 216), 252.
- Perkins v. Hadsell (50 Ill. 216), 259.
- Picard v. McCormick (11 Mich. 68), 209.
- Pick v. Rubicon (27 Wis. 433), 442.
- Pike v. Pike (121 Mich. 170), 20.
- Pinch v. Hataling (142 Mich. 522), 212.
- Prichard v. Atkinson (3 N. H. 335), 78.
- Pingle v. Connor (66 Mich. 187), 109.
- Phelan v. Paycreno (74 Calif. 456), 18.
- Phillips v. Stanich (20 Mich. 369), 102.
- Phinney v. Hall (101 Mich. 451), 243.
- Phinizy v. Guernsey (111 Ga. 346, 78 Am. St. Rep. 207), 23.
- Place v. Brown (37 Mich. 575), 231.
- Powell v. Dayton etc. R. R. Co. (12 Ore. 488, 8 Pac. 544, 14 Ore. 356, 12 Pac. 665, 16 Ore. 33, 8 Am. St. Rep. 251, 16 Pac. 863), 23.
- Powell v. Dayton (36 S. E. 796), 23.
- Powers v. Schottens (70 Mich. 299), 152.
- Pratt v. Allegan Cir. Judge (177 Mich. 558), 212.
- Prive v. Haynes (37 Mich. 489), 43.
- Probett v. Walters (70 Mich. 437), 198.
- Pullings Est. (97 Mich. 376), 43.
- Plumer v. Brown (8 Metc. (Mass.) 578), 76.
- Q
- Quarg v. Scher (136 Calif. 406, 69 Pac. 96), 211.
- R
- Radford v. Wilson (2 Bosw. (N. Y.) 237), 219.
- Randell v. Chubb (46 Mich. 311), 172.
- Rathbone v. Groh (137 Mich. 373, 100 N. W. 568), 116, 257.
- Raubitschek v. Blank (80 N. Y. 479), 10.
- Raynard v. Davis (127 Mich. 571), 114.
- Realty Co. v. Shaffer (176 Mich. 639), 106.
- Rease v. Kittle (56 W. Va. 269, 49 S. E. 150), 252, 259.
- Reed v. Lukens (44 Pa. St. 200, 84 Am. Dec. 425), 23.
- Re. Appeal of Nellie Lewis (85 Mich. 340), 45.
- Re. Est. of Pulling (97 Mich. 376), 43.
- Re. Stanton's Estate (142 Mich. 495), 43.
- Reimer v. Rise (38 Wis. 16, 59 N. W. 450), 251.

[References are to Sections]

- Relf v. Cherly (23 Ia. 467), 215.
 Reo Car Co. v. Young (209 Mich. 591), 112.
 Renard v. Klinck (91 Mich. 1), 198.
 Rev. Stat. Mich. (1858), pp. 573, 574; 1.
 Rhea v. Myers Est. (111 Mich. 140), 19.
 Rice v. Gibbs (40 Neb. 264, 58 N. W. 724), 252.
 Ricker v. Butler (45 Mich. 545, 42 N. W.), 407.
 Richardson v. Hartwick (106 U. S. 252), 259.
 Rhode v. Hassler (113 Mich. 56), 86.
 Richmond v. Robinson (12 Mich. 201), 193, 231.
 Richardson v. Green (61 Fed. 423), 231.
 Ricker v. Butler (45 Minn. 545), 76.
 Richmond v. Robinson (12 Mich. 193), 102.
 Rife v. Lyborger (49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403), 78.
 Riopelle v. Gilman (23 Mich. 33), 76.
 Robson v. Townley (176 Mich. 581), 43.
 Robert v. Merchant (1 Hare 547), 115.
 Robinson v. Perry (21 Ga. 183, 68 Anno. Dec. 455), 172.
 Robinson v. Trufant (97 Mich. 410), 178.
 Rockland Rockport Lime Co. v. Leary (203 N. Y. 469, 97 N. W. 43, L. R. A. 1916 F-352), 255, 257.
 Rodenhouse v. Degolio (198 Mich. 402), 59.
 Rogers v. Eaton (181 Mich. 620), 77.
 Rodgers v. Bevkell (172 Mich. 530, 544), 73.
 Rogers v. Eaton (181 Mich. 620), 77.
 Roper v. Milburn (93 Neb. 809, 142 N. W. 792, Am. Cases 1914, B-122), 2.
 Rosenbaum v. Tyszka (192 Mich. 457), 18.
 Rose v. Loescher (152 Mich. 385), 145.
 Ross v. Leascher (152 Mich. 589), 145.
 Ross v. Parks (93 Ala 153, 8 S. Rep. 368, 30 Am. St. Rep. 11 L. R. A. 148), 248.
 Rowden v. Dodge (40 Mich. 697), 10, 12.
 Rowe v. Kellogg (54 Mich. 206), 152.
 Roup v. Roup (136 Mich. 385), 22.
 Roy v. Haviland (72 Ind. 364), 231.
 Rubenstine v. Powers (215 Mich. 435), 112.
 Rucker v. Jackson (60 So. 139, 180 Ala. 109), 74.
 Rude v. Levy (43 Col. 482, 96 Pac. 560, 24 L. R. A. 91, 27 Am. St. Rep. 123), 259.
 Russell v. Androe (79 Wis. 108, 48 N. W. 117), 251.
 Russell v. Nester (46 Mich. 291), 115.
 Russell v. Meyers (32 Mich. 522), 12.
 Russell v. Sweezey (22 Mich. 255), 58, 116.
 Rust v. Conrod (47 Mich. 449, 499, 454, 11 N. W. 465), 20, 103, 105.
 Ryan v. United States (136 U. S. 68, 84-86), 10.
 Ryder v. Flanders (30 Mich. 336), 151.
 Ryderson v. Willis (81 N. Y. 277), 215.

S

- Sabine v. Johnson (35 Wis. 185, 201), 78.
 Saffrain v. McDonald (27 Ind. 269), 252.

[References are to Sections]

- Saltonstall v. Gordon (33 Ala. 149), 225.
- Sandum v. Johnson (122 Minn. 368, 142 N. W. 878, 48 L. R. A. (N. S.) 619), 78.
- Sanquerisee v. Benedetti (1 Bar. 315), 109.
- Sargent v. Ballard (Mass., 9 Pick 251), 76.
- Sarncono v. Carrano (92 Conn. 563, 103 Atl. 631), 253.
- Satterlee v. Cronkhite (114 Mich. 634), 171, 180.
- Saurs v. Giddings (90 Mich. 50), 74.
- Sawyer v. Kendall (10 Cush. (Mass.) 241), 76.
- Sayles v. Curtis (45 Mich. 279), 151.
- Sayers v. McKenner (211 Mich. 249), 122.
- Scofield v. Lansing (17 Mich. 437), 64.
- Scadin v. Sherwood (67 Mich. 230), 77.
- Schmide v. Gaukler (156 Mich. 243), 186.
- Schmidt v. Steinback (193 Mich. 640), 86, 116.
- Schoenfeld v. Kemter (211 Mich. 464), 122.
- Schuler v. Bomonder (80 Mich. 531), 198.
- Schwartz v. Woodruff (132 Mich. 513), 77.
- Schweiss v. Woodruff (73 Mich. 473), 57, 116.
- Scott v. Bush (26 Mich. 418), 10, 20.
- Scott v. Sullivan (159 Mich. 297), 171, 180.
- Seager v. Cooley (44 Mich. 14), 58, 116.
- Sears v. Smith (2 Mich. 243), 231.
- Security Investment Co. v. Meister (214 Mich. 337), 79, 94.
- Sewell v. Underhill (197 N. Y. 168, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863, 18 Ann. Cases 795), 23.
- Seymour v. Rood (121 Mich. 173), 79.
- Seymour v. Warren (179 N. Y. 1), 10, 15.
- Segler v. Segler (108 Mich. 591), 112.
- Shaeffer v. Shiade (7 Blackf. (Ind.) 178), 214.
- Shafer v. Niver (9 Mich. 253), 178.
- Shaw v. Nichalay (30 Mo. 99), 76.
- Shelden v. Mich. Cent. R. R. (161 Mich. 503), 76.
- Shipman v. Campbell (79 Mich. 82), 18.
- Showers v. Robinson (443 Mich. 502), 71.
- Shultz v. Redondo (156 Calif. 439, 105 Pac. 1180), 211.
- Shupert v. Ingham Co. Treas. (214 Mich. 333), 59.
- Sigler v. Silger (108 Mich. 591), 20.
- Silver v. Daenzer (167 Mich. 362), 77.
- Silver v. Shulman (213 Mich. 211), 96, 100, 122.
- Simis et al. v. McElray (160 N. Y. 156, 54 N. E. 674, 73 A. S. R. 673), 78.
- Simmon v. Zimmerman (144 Calif. 256, 79 Pac. 451, 1 Anno. Cases 850), 172.
- Simon et al. v. Vanderver (155 N. Y. 377, 49 N. E. 1043, 63 A. S. R. 683), 78.
- Sixta v. Ontonagon Valley Land Co. (157 Wisc. 293, 147 N. W. 1042), 258.
- Skinner & Sons v. Houghton (92 Md. St. Rep. 485, 48 Atl. 85), 23.
- Slaver v. Breese (36 Mich. 77), 18.

[References are to Sections]

- Slocum v. Smith (195 Mich. 281), 242.
- Slotkin v. Schuman (210 Mich. 513), 97, 98, 122.
- Small v. Kennedy (137 Ind. 299, 33 N. E. 674), 212.
- Smellings v. Salley (103 Mich. 580), 20.
- Smiddy v. Grafton (163 Calif. 16, 124 Pac. 433, Anno. Cases (1913) E-923), 255.
- Smith v. Fleeks (App. 69 Pa. St. 474), 253.
- Smith v. Bangham (156 Calif. 359, 104 Pac. 689, 29 L. R. A. (N. S.) 522), 257, 259.
- Smith v. Mich. Realty Co. (175 Mich. 600), 211, 242.
- Smith v. Ryan (191 N. Y. 452, 84 N. E. 402), 215.
- Smith v. Lawrence (15 Mich. 499), 20.
- Smith v. Woodson (Ky., 92 S. W. 980), 225.
- Smith v. Starke (196 Mich. 311), 242.
- Smith v. Reed (24 Mich. 240), 164.
- Smith v. Nelson (165 Mich. 438), 166.
- Smith v. Hunter (241 Ill. 514, 89 N. E. 686, 132 A. S. R. 231), 78.
- Smith v. Hughes (50 Wis. 620, 627), 78.
- Smith v. Mellon (116 Minn. 198), 78.
- Smith v. Tock (61 Ind. App. 42, 111 N. E. 442), 110.
- Smith v. Mathias (174 Mich. 262), 16.
- Smith v. Livermore (15 Mich. 381), 499.
- Smith v. Sheridan (175 Mich. 403), 43.
- Smythe v. Henry (41 Fed. 705), 214.
- Snow v. Nelson (113 Fed. 353), 252.
- Snowman v. Harford (57 Me. 397), 109.
- Snyder v. Castor (4 Yeates 353), 19.
- Solomon v. Shentz (185 Mich. 620, 150 N. W. 196), 95, 102, 115, 250.
- Sovereign v. Orlman (47 Mich. 181), 12.
- Spraule v. Ala. & V. Ry. Co. (29 So. 163), 74.
- Spaulding v. Archibald (52 Mich. 365), 12.
- Springfield Traction Co. v. Warrick (249 Ill. 470, 94 N. E. 933), 214.
- Stanton's Est. (142 Mich. 491), 43.
- St. Luke's Parish of Cedar Falls v. Miller (Ia., 84 N. W. 686), 74.
- State Security & Realty Co. v. Badger (200 Mich. 104), 213.
- Starrs v. Scougale (48 Mich. 387), 225.
- Standard Steel Co. v. Stamm (207 Pa. St. 419, 56 Atl. 954), 225.
- Standard Oil v. Murray (214 Mich. 297-299), 113.
- Statt v. Avery (156 Mich. 674), 112.
- State Security & Realty Co. v. Shaffer (176 Mich. 639), 114.
- Stamp v. Steel (209 Mich. 205), 18.
- Starkweather v. Benjamin (32 Mich. 305), 211.
- Stevens v. Castel (63 Mich. 111), 58.
- Stewart v. Gardner (152 Ky. 120, 153 S. W. 3), 254.
- Stenbridge v. Stenbridge (87 Ky. 91, 7 S. W. 611), 252.
- Stephens v. Black (77 Pa. 138), 155.
- Steinbach v. Hill (25 Mich. 78), 204.

[References are to Sections]

- Stevens v. Castel (63 Mich. 111-117), 22, 58, 116.
- Stevens v. Stevens (181 Mich. 438, 449), 61.
- Stevens v. Jackson (180 Mich. 131), 13.
- Steven v. Wakeman (213 Mich. 560-567), 14, 43.
- Stevens v. Leonard (122 Mich. 125), 43a.
- Stickney v. Parmenter (35 Mich. 237), 171, 182, 183.
- Stonehouse v. Stonehouse (156 Mich. 686), 20.
- Stoney Creek Woolen Co. v. Smalley (111 Mich. 322), 212.
- Stoddard v. Prescott (58 Mich. 542), 64.
- Strasser v. Stick (216 Pa. St. 577, 66 Atl. 87), 252.
- Strang v. Goose (110 Mich. 153, 67 N. W. 1108), 251.
- Stange v. Wilson (17 Mich. 341), 24.
- Stringer v. Gamble (155 Mich. 295), 62.
- Stuart v. Mattern (141 Mich. 686), 20.
- Stuhr v. Butterfield (151 Ia. 736, 36 L. R. A. (N. S.) 321, 130 N. W. 897), 78.
- Stutts v. Brown (112 Ind. 370), 186.
- Sullivan v. Dunham (42 Mich. 521), 14.
- Summer v. Staton (N. C., 65 S. E. 902), 214.
- Summers v. Abernathy (234 Mo. 126, 136 S. W. 289), 214.
- Supple v. Wheeler (210 Mich. 672), 22.
- Sutton v. Rowley (44 Mich. 112), 10, 19.
- Surgey v. Dickey (199 Mich. 251), 77.
- Swallow v. Strom (83 Minn. 87, 85 N. W. 942), 10.
- Swint v. Carr (76 Ga. 322, 2 Am. St. Rep. 44), 106.
- Swimm v. Bush (23 Mich. 99), 225.
- Sword v. Keith (31 Mich. 247), 19.

T

- Tabor v. Mich. Mut. Life Ins. Co. (44 Mich. 324), 199.
- Tabler v. Sheffield Land Co. (79 Ala. 377, 58 Am. Rep. 593), 172.
- Talbot v. Cook (112 Pac. 709, 57 Ore. 535), 74.
- Tandy v. Weerch (154 Cal. 108, 97 Pac. 69), 210.
- Tate v. Aitken (5 Calif. App. 505, 90 Pac. 836), 251.
- Tattan v. Bryant (198 Mich. 515, 165 N. W. 778), 96, 250, 253.
- Taylor v. Boardman (24 Mich. 387), 19.
- Taylor v. Scott & Co. (149 Mich. 525), 10.
- Taylor v. DeVoe (100 Mich. 581), 79.
- Tewksbury v. Howard (138 Ind. 110), 70.
- Thatcher v. St. Andrews' Church, 22.
- Thomas v. Cain (35 Mich. 155), 64.
- Thomas v. Miller (202 Mich. 43), 210.
- Thomas v. McCue (19 Wn. 287, 53 Pac. 161), 214.
- Thomas Sand & Title Co. v. Deville (100 Ind. 309), 10.
- Thomason v. Bescher (176 N. C. 622), 248.
- Thompson's Title to Real Est., 77.

[References are to Sections]

- Thompson v. Stillwell (161 S. W. 681, 253 Mo. 89), 74.
 Thompson v. Milliken (93 Kan. 72, 143 Pac. 431), 216.
 Thompson v. Hurson (201 Mich. 685), 13.
 Thompson v. Sheppard (Ala., 5 So. 334), 218.
 Tibbens v. Burrell (46 Pa. Sup. Ct. 466), 214.
 Tiedman on Real Prop. (3 Ed.), 183.
 Timkin v. Piper (141 Mich. 95), 79.
 Todd v. McLaughlin (125 Mich. 268), 77.
 Tompkins v. Hollister (60 Mich. 470), 199.
 Tong v. Martin (15 Mich. 60), 226.
 Topp v. White (12 Heisk (Tenn.) 165), 231.
 Tower v. Det. Trust Co. (19 Mich. 670), 171, 181.
 Townsend v. Goodfellow (40 Minn. 312, 41 N. W. 1056, 12 A. S. R. 736, 3 L. R. A. 739), 78.
 Townsend v. Vanderwerker (160 U. S. 171, 40 L. Ed. 383, 16 Sup. Court 258), 21, 62.
 Trast v. Courtes (172 Mass. 401), 76.
 Tradesman Co. v. Superior Mfg. Co. (147 Mich. 702), 206.
 Trice v. Kayton (84 Va. 217), 78.
 Triangle Land Co. v. Nessen (155 Mich. 483), 82.
 Trustee v. Walrath (27 Mich. 232), 145.
 Truesdail v. Ward (24 Mich. 116), 182.
 Tull v. Wright (37 Mich. 93), 71.
 Turner v. Union Pac. Ry. (112 Mo. 542, 20 S. W. 673), 74.
 Turner v. McCormick (56 W. Va. 161, 49 S. E. 28, 108 Am. St. Rep. 904, 67 L. R. A. 853), 254.
- U
- Underwood v. Slaght (213 Mich. 391), 14.
 Union Trust Co. v. Det. Common Council (170 Mich. 692), 59.
 Union Trust Co. v. Rodford (176 Mich. 50), 59.
 United States v. Sutherland (60 U. S. (19 Howell) 363, 15 L. Ed. 666), 18.
 Uran v. Coates (109 Mass. 578), 15.
- V
- Van Auken v. Livingston (34/384), 151.
 Vanderkarr v. Thompson (19 Mich. 82), 24.
 Van Duren v. Lamphear (54 Mich. 575), 43.
 Vandervelde v. Wilson (176 Mich. 191), 82.
 Van Norsdal v. Smith (141 Mich. 355), 105.
 Van Praeger v. Everidge (1902) (2 Ch. App. 271), 110.
 Van Vleet v. Blackwood (39 Mich. 728), 156.
 Vassault v. Edwards (43 Coly 459), 246, 253.
 Vaughn v. Sheridan (50 Mich. 155), 242.
 Veyer v. Mound City Assn. (97 Calif. 659), 18.
 Vincent v. Evans (165 Mich. 695), 79.
 Vincent v. City of Kalamazoo (111 Mich. 230), 76.
 Vought v. Williams (120 N. Y. 253, 24 N. E. 195, 17 A. S. R. 634, 8 L. R. A. 591), 78.

[References are to Sections]

W

- Wabash Ry. Co. v. Grote (53 Ind. App. 583), 209.
 Wadell v. Williams (62 Mich. 50), 18.
 Waite v. Stanley (88 Vt. 407, L. R. A. (N. S.) 1916 C.), 23.
 Wales v. Coffin (95 Mass., 13 Allen 213), 43.
 Walker v. Casgram (101 Mich. 604), 207.
 Walker v. Walker (Ia, 61 N. W. 930), 231.
 Walker v. Sullivan (127 Mich. 267), 114.
 Walker v. Casgrain (101 Mich. 608), 186.
 Walker v. Gillman (127 Mich. 269), 77.
 Walker v. Schultz (175 Mich. 280), 86.
 Walker v. Kelley (91 Mich. 212, 51 N. W. 934), 103.
 Walsh v. Branard (Minn. 1905, 103 N. W. 1031), 10, 15.
 Walsh v. Dord (277 Ex. Civil App. 573, 66 S. W. 854), 150.
 Walsh v. Branard (Minn. 1905, 103 N. W. 1031), 10.
 Wallace v. Kelley (148 Mich. 338), 12.
 Waller v. Lieberman (214 Mich. 441, 445), 14, 24.
 Walsh v. Oakman (199 Mich. 688), 24.
 Wanser v. DeNyse et al. (188 N. Y. 378, 80 N. E. 1088, 117 A. S. R. 871), 78.
 Ward v. Davis (154 Mich. 413), 15.
 Wardell v. Williams (62 Mich. 50, 55), 18.
 Warren v. Richmond (53 Ill. 42), 109.
 Warren v. Fenn (28 Barb. N. Y. 333), 62.
 Warren v. Warren (151 Mich. 402), 79.
 Warren Mfg. Co. v. City of Baltimore (119 Md. 188, 86 Atl. 502), 105.
 Warville v. Vendors (Sec. 735), 186.
 Watkins v. Miner (214 Mich. 380), 95, 120.
 Waterman v. Bank (144 U. S. 394), 254.
 Watson v. Coast (35 W. Va. 463, 14 S. E. 249), 255.
 Watson Coal Co. v. Casteel (68 Ind. 476), 216.
 Watson v. Wagner (202 Mich. 397), 228.
 Watler v. Hartwig (106 Ind. 123, 6 N. E. 5), 64.
 Way v. Root (174 Mich. 418), 99.
 Wayne v. Beeman (211 Mich. 361), 97, 98.
 Wayne v. Herkimer (167 Mich. 587), 209.
 Wayne Woods Land Co. v. Beeman (211 Mich. 360, 178 N. W. 696), 259.
 Weaver v. Richards (144 Mich. 395), 77.
 Weaver v. Burr (3100 Va. 736, 8 S. E. 745), 248, 253.
 Webster v. Cecil (30 Baer 62), 110.
 Webster v. Bailey (31 Mich. 36), 209.
 Weber v. Weber (47 Mich. 569), 210.
 Webster v. Bailey (31 Mich. 36), 214.
 Webster v. Gray (37 Mich. 37), 10.
 Webster v. Brown (67 Mich. 328), 18.
 Weed v. Torry (2 Doug. Mich.) 344, 45 Am. Inc. 257), 102, 109.

[References are to Sections]

- Weissert v. Fuller (188 Mich. 327), 86.
- Weiss v. Claborn (Tex. C. App., 219 S. W. 884), 253.
- Weisberger v. Wisner (55 Mich. 518), 58, 116, 246.
- Welsh v. Oakman (199 Mich. 188), 16.
- Welch v. Welsy (62 Mich. 15), 20.
- Wells v. Calnan (107 Mass. 514, 9 Am. Rep. 325), 23.
- Wellburn v. Tiller (10 Ala. 305), 231.
- Welling v. Strickland (161 Mich. 235), 180.
- Wellington v. Strickland 161 Mich. 235), 148.
- Western Co. v. Novatny (32 S. D. 565, 143 N. W. 895), 209.
- Wesley v. Ells (177 U. S. 370, 20 S. Ct. 661, 44 U. S. (L. Ed.) 810), 78.
- Western R. R. Co. v. Babcock (6 Met. 346), 110.
- West Va. Pulp & Paper Co. v. Cooper (W. Va., 106 S. E. 55), 245.
- Wetmore v. Neuberger (44 Mich. 362), 20.
- Whealton et al. v. Daughy (72 S. E. 112, Va. 649), 74.
- Whitbeck v. Cook (15 John (N. Y.) 482), 78.
- White v. Hoenighousen (211 Mich. 471), 242.
- White v. Hapeman (43 Mich. 267), 151.
- White v. Nutt (1 P. Wms. 61), 23.
- Whitaker v. Erie Shooting Club et al. (102 Mich. 454), 74.
- Whitney v. Port Huron (88 Mich. 268), 64.
- Whitman v. Whitman (207 Mich. 337), 112.
- Whiting v. Butler (29 Mich. 122), 12, 151.
- Wilcox v. Cline (70 Mich. 519), 15.
- Wiley v. Lovely (46 Mich. 83), 18.
- Wilhelm v. Herron (211 Mich. 339), 76, 79.
- Wilbur v. Flood (16 Mich. 40), 218.
- Wilkinson v. Williams (51 Mich. 156), 151.
- Wilkinson v. Hardaway (159 Ala. 565, 48 P. 678), 252.
- Wills v. Ross (77 Ind. 1), 10.
- Williams v. Smith (161 Mass. 48), 10.
- Williams v. Fox (152 Mich. 217), 71.
- Williams v. Bricher et al. (83 Kan. 53, 30 L. R. A. (N. S.) 343), 78.
- Williams v. Shuman (141 Ga. 114), 186.
- Williams v. Spurr (24 Mich. 335), 225.
- Williams Estate (106 Mich. 490), 19.
- Wiechers v. McCormick (107 N. Y. Supp. 835), 74.
- Wilson v. Larson (138 Ia. 708, 116 N. W. 703), 106.
- Wilson v. Bolen (152 Ill. App. 210), 210.
- Wilson v. Eggleston (27 Mich. 257), 226, 228.
- Winders v. Keenan (161 N. C. 628, 77 S. E. 687), 250.
- Wisconsin etc. R. R. Co. v. McKenna (139 Mich. 43), 22.
- Witt v. Sims (Ga., 78 S. E. 467), 214.
- Wittings Succession (121 Ia. 510, 46 So. 606, 15 Am. Cases 379), 257.
- Whitford v. Crux (54 Mich. 261), 76.
- Winter v. Lord Anson (3 Russ. 488), 62.

[References are to Sections]

- Wollenslagle v. Runals (76 Mich. 545), 209.
- Wood v. Davis (154 Mich. 413, 117 N. W. 897), 254.
- Woodward v. Clark (15 Mich. 104), 58.
- Woodfolk v. Norley (98 Tenn. 467, 40 S. W. 479), 216.
- Woods v. Palmer (151 Mich. 30), 243.
- Woods Land Co. v. Beeman (211 Mich. 360), 122.
- Woodward v. Walker (192 Mich. 188), 112.
- Woodward v. Clark (15 Mich. 104), 58.
- Woodwarth v. Porter (213 Mich. 314), 121.
- Woodworth v. Gorton (46 Mich. 324), 64.
- Worthley v. Burbanks (45 N. E. 779, 146 Ind. 534), 74.
- World Mfg. Co. v. Kent Circuit Judge (115 Mich. 652), 123.
- Worth v. Watts (76 N. J. Eq. 299, 74 Atl. 434), 101.
- Worcester v. Cook (220 Mass. 539, 108 N. E. 511), 211.
- Wolf v. Meyantz (184 Mich. 452), 24.
- World Mfg. Co. v. Kent Cir. Judge, (115 Mich. 650), 80.
- Wright v. Wright (37 Mich. 55), 212.
- Wright v. Deniston (29 N. Y. Supp. 718), 214.
- Wright v. Peet (36 Mich. 213), 218.
- Wright v. Wright (37 Mich. 35), 204.
- Wright v. Trover (73 Mich. 495), 145.
- Wright v. DeGroff (14 Mich. 164), 10.

Y

- Yale v. Stevenson (58 Mich. 537), 151.
- Yerkes v. Richards (153 Pa. St. 646, 34 Am. St. Rep. 721, 26 Atl. Rep. 221), 248.
- Yonell v. Kridler (105 Mich. 344), 14.
- Yonvell v. Allen (18 Mich. 107), 14, 109.
- Young v. Walker (224 Mass. 491), 186.

Z

- Zetterlund v. Texas L. & C. Co. (55 Neb. 355, 75 N. W. 860), 172.
- Zigen v. Rosier (200 Mich. 328), 122.
- Zimmerman v. Miller (206 Mich. 600), 18.

Index To Forms

[References are to Pages]

ACKNOWLEDGMENTS:

authentication of written instruments executed outside of state, 108 N.
containing statutory provision, 104, 107.

AFFIDAVITS:

on appeal in summary proceedings, 334.
posting notices of sales, on sale by circuit court commissioners, 413.
recording of, to remedy defect of record, 126.
to correct names of parties, 126.

AGREEMENT PRELIMINARY:

escrow, 73.
form favorable to vendee, 67.
form favorable to vendor, 68.
short form, 65.
short form, for sale of real estate for cash, 64.

ANSWER IN EQUITY:

answers used in late Michigan cases:
Banski v. Milchalski (204 Mich. 15), involving fraudulent mis-
representations, 532.
Bignell v. Franks (212 Mich. 236), involving foreclosure of
vendor's lien, 422.
Birney v. Ready (216 Mich. 7), involving specific perform-
ance, 288.
Clark v. Johnson (214 Mich. 578), involving reformation of
land contracts, 459.
Hubbel v. Ohler (213 Mich. 664), involving forfeiture of land
contracts, 388.
LaBranch v. Perron (209 Mich. 239), involving reformation of
land contracts, 478.
Lozon v. McKay (203 Mich. 364), involving forfeiture of land
contracts, 380.
Lyle v. Munson (213 Mich. 250), involving specific performance
and equitable estoppel, 299.
Moore v. Provost (205 Mich. 687), involving remedying defects
in title, 213.
Security Investment Co. v. Meister (214 Mich. 337), involving
remedying defects in title and relief from forfeiture, 197.

[References are to Pages]

ASSIGNMENT OF LAND CONTRACT:

- long form, 89.
- short form, with vendor's consent, 91.

BILL OF COMPLAINT:

- see "Cross Bills".
- cancel land contract after forfeiture, 182.
- declaring specific performance by vendee against administrator and heirs of vendor, 269.
- declaring specific performance agreement in writing, 263.
- declaring specific performance, vendor against vendee, 271.
- declaring specific performance, verbal agreement, 266.
- foreclosure of land contract, 406.
- forfeiture, to have legally established, 340.
- reform a land contract, 452.
- relief from forfeiture, including averments for specific performance and injunctive relief, 369.
- rescind land contract for fraudulent misrepresentations—(see also forms used in late Michigan cases, *supra*), 515.
- to quiet title because of outstanding tax title, misdescription of premises, failure to state the marital status of certain grantors, containing averments necessary in case of unknown heirs, legatees and devisees, 177.
- to quiet title, cloud created by quit-claim deed by vendee, 183.
- to quiet title to an easement, 186.
(used in late Michigan cases.)
- Banski v. Milchalski* (204 Mich. 15), involving fraudulent misrepresentations, 522.
- Bignell v. Franks* (212 Mich. 236), involving foreclosure of vendor's lien, 418.
- Birney v. Ready* (216 Mich. 7), involving specific performance, 282.
- Clark v. Johnson* (214 Mich. 578), involving reformation of land contracts, 455.
- Hubbell v. Ohler* (213 Mich. 664), involving forfeiture of land contracts, 385.
- LaBranche v. Perron* (209 Mich. 239), involving reformation of land contracts, 470.
- Lozon v. McKay* (203 Mich. 364), involving forfeiture of land contracts, 372.
- Lyle v. Munson* (213 Mich. 250), involving specific performance, 295.
- Moore v. Provost* (205 Mich. 687), involving remedying defects in title, 204.
- Nelson v. Breitenwischer* (194 Mich. 30), involving foreclosure of vendor's lien, 440.

[References are to Pages]

Security Investment Co. v. Meister (214 Mich. 337), involving remedying defects in title and relief from forfeiture, 188.

BOND ON APPEAL:

in summary proceedings, 335.

BROKERS:

application for license, broker's, 559.

application for license, business chance broker, 560.

application for license, real estate salesman, 562.

CERTIFICATE DISCHARGING MORTGAGE:

form of, 128.

CIRCUIT COURT COMMISSIONER:

affidavit of posting notices of sales, 413.

affidavit on appeal, before, 334.

bond on appeal, 335.

complaint on summary proceedings, 330.

deed on foreclosure sale, 411.

notice of sale by, 413.

receipt from, on sale, 411.

report of sale, 414.

return on appeal, 337.

statement of fees and disbursements by, on sale, 417.

CROSS BILL:

forms used in late Michigan cases:

Bignel v. Franks (212 Mich. 236) involving foreclosure of vendor's lien, 422.

Birney v. Ready (216 Mich. 7), involving specific performance, 288.

Clark v. Johnson (214 Mich. 578), involving reformation of land contract, 462.

Hubbel v. Ohler (213 Mich. 664), involving forfeiture of land contract, 388.

LaBranche v. Perron (209 Mich. 239), involving reformation of land contracts, 478.

Security Investment Co. v. Meister (214 Mich. 337), involving remedying defects in title, 197.

DAMAGES, ACTIONS FOR:

action for fraudulent misrepresentation, 521.

forms used in late Michigan cases:

Barnhardt v. Hamel (207 Mich. 232), involving fraudulent misrepresentation, 546.

Lion v. Henry Bradford (209 Mich. 15), involving fraudulent misrepresentation, 539.

[References are to Pages]

DECLARATION:

actions for fraudulent misrepresentation, 521.

ejectment, form of, 328.

forms used in late Michigan cases:

Barnhardt v. Hamel (207 Mich. 232), involving fraudulent misrepresentation, 546.

Lion v. Henry Bradford (209 Mich. 15), involving fraudulent misrepresentation, 539.

DECREES:

foreclosure of land contract, 409.

foreclosure of land contract, 436.

forfeiture effected, decreeing, 342.

forfeiture effected, denying relief to plaintiff, form used in Hubbel v. Ohler (213 Mich. 664), 396.

for specific performance of written contract, 265.

for specific performance, part performance of verbal contract, 309.

quieting title, canceling land contract, 181.

quieting title for misdescription of the premises, failure to state marital status of certain grantors, 179.

quiet title, on bill to, in favor of defendant or cross bill, relieving defendant from forfeiture, form used in Lyle v. Munson (213 Mich. 250), 200.

reforming land contracts, 454.

reforming land contract form used in Clark v. Johnson (214 Mich. 578), 467.

reforming land contract, form used in LaBranch v. Perron (209 Mich. 239), 482.

rescinding land contract for fraudulent misrepresentation, 538.

to defendant on cross bill, 200.

DEEDS:

By executor or administrator pursuant to land contract under P. A. 396, 1919, 280.

DISCHARGE OF ANCIENT MORTGAGE:

form of certificate, 128.

form of petition, 127.

EASEMENT:

bill of complaint to quiet title to, 186.

EQUITY:

see bills of complaint, *infra*.

see decree, *infra*.

ESCROW:

memorandum for disposition of land contract in, 73.

[References are to Pages]

FORECLOSURE OF LAND CONTRACT:

answer in equity.

form used in late Michigan cases:

Bignell v. Franks, 418.

bill of complaint, 406.

form used in Bignell v. Franks, 418.

Nelson v. Breitenwischer, 440.

before circuit court commissioner:

for forms, see circuit court commissioner, this index.

cross bill, form used in Bignell v. Franks, 422.

decree, foreclosure of land contract, 409.

decree, foreclosure of land contract, 436.

motion to dismiss bill of complaint, failure to pay mortgage tax, 446.

notice of forfeiture of land contract, 320.

FORFEITURE:

see Summary Proceedings, Circuit Court Commissioner.

bill of complaint for relief from forfeiture, including averments for specific performance and injunctive relief, 369.

bill of complaint to cancel land contract after forfeiture, 182.

bill of complaint to have forfeiture legally established, 340.

notice of, 320.

FRAUDULENT MISREPRESENTATIONS:

answer in equity—forms used in late Michigan case of Banski v. Milchalski, 532.

bill of complaint to rescind land contract for, 515.

bill of complaint—form used in Banski v. Milchalski, 522.

declaration, action for, 521.

declaration, forms used in:

Barnhardt v. Hamel, 546.

Lion v. Bradford, 539.

decree, rescinding land contract for, 538.

LAND CONTRACTS:

Detroit land contract form, 81.

for sale of city lots, vendor to advance funds for building, 91.

for sale of farm land on long time, 87.

form containing special tax clause, 85.

form for recording payments on, 89.

general form, 74.

Union Trust Company form, 78.

Wayne County Abstract Company's form, 76.

LICENSE:

see "Brokers".

[References are to Pages]

MOTION:

- to dismiss bill of complaint, 439.
- used in *Nelson v. Breitenwischer* (194 Mich. 30), 446.

NOTICE:

- of forfeiture of land contract, 320.
- of sale by circuit court commissioners, 413.

ORDER:

- of publication, Probate Court, on petition for specific performance, 278.
- proof of service, of, 278.
- specific performance of land contract, Probate Court, 279.

OPINION:

- of the trial court, 306.
- used in *Lyle v. Munson* (213 Mich. 250), 282.

OPTION:

- form of, 573.

PETITIONS:

- for discharge of mortgage, 127.
- for specific performance in Probate Court, 276.

POWER OF ATTORNEY:

- to sell or lease land, 96.

PRELIMINARY AGREEMENT:

- form favorable to vendee, 67.
- form favorable to vendor, 68.
- short form, 65.
- short form, for sale of real estate for cash, 64.
- escrow, 73.

PROBATE:

- order of publication on petition, 278.
- petition for specific performance, 276.
- proof of publication, 279.
- proof of service of order, 278.
- specific performance, order for, 279.

PROOF OF SERVICE:

- of order, 278.
- of publication, 279.

QUIETING TITLE:

- answer, form used in late Michigan cases:
 - Moore v. Provost*, 213.
 - Security Investment Co. v. Meister*, 197.

[References are to Pages]

- bill of complaint, cloud created by quit-claim deed by vendee, 183.
- bill of complaint, to quiet title because of outstanding tax title, misdescription of the premises, failure to state marital status of certain grantors, containing averments necessary in case of unknown heirs, legatees and devisees, 177.
- bill of complaint, to quiet title to an easement, 186.
- bill of complaint, forms used in *Moore v. Provost*, 204.
- Security Investment Co. v. Meister*, involving remedying defects in title, 188.
- decree, quieting title, canceling land contract, 181.
- decree, quieting title, misdescription of premises, 179.

REAL ESTATE BROKERS:

see "Brokers".

RECEIPTS:

from Circuit Court Commissioners on sale, 418.

REFORMATION OF CONTRACTS:

- answer, forms used in late Michigan cases:
 - Clark v. Johnson*, 459.
 - LaBranch v. Perron*, 478.
- bill of complaint for, 452.
- bill of complaint, forms used in:
 - Clark v. Johnson*, 455.
 - LaBranch v. Perron*, 470.
- cross bill, forms used in:
 - Clark v. Johnson*, 462.
 - LaBranch v. Perron*, 478.
- decree, forms used in:
 - Clark v. Johnson*, 467.
 - LaBranch v. Perron*, 482.

RELIEF FROM FORFEITURE:

- answer, form used in late Michigan cases:
 - Hubbell v. Ohler*, 388.
 - Lozon v. McKay*, 380.
- bill of complaint, including averments for specific performance and injunctive relief, 369.
- bill of complaint, form used in *Lozon v. McKay*, 372.
- cross bill, form used in *Hubbell v. Ohler*, 388.
- decree, granting relief from, form used in *Hubbell v. Ohler*, 396.

RETURN ON APPEAL:

in summary proceedings, 337.

SPECIFIC PERFORMANCE:

Answer, forms used in late Michigan cases:

[References are to Pages]

Birney v. Ready, 288.

Lyle v. Munson, 299.

bill of complaint, by vendee against administrator and heirs of vendor, 269.

bill of complaint, agreement in writing, 263.

bill of complaint, oral agreement, 266.

bill of complaint, vendor against vendee, 271.

bill of complaint, forms used in:

Birney v. Ready, 282.

Lyle v. Munson, 295.

cross bill, forms used in:

Birney v. Ready, 288.

decree, written contract, 265.

decree, part performance of verbal contract, 309.

SUMMARY PROCEEDINGS:

affidavit on appeal, 334.

bond on appeal, 335.

form of complaint in, 330.

return on appeal, 337.

General Index

[References are to Pages]

FOR FORMS, SEE INDEX TO FORMS

ABSTRACT OF TITLE:

- abstracts held defective, 146, 152.
- building restrictions as clouds on title, 247, 26 N.
- clouds on the title, how removed, 164.
- clouds on the title, definition of, 122.
- correcting, by removing ancient mortgages, 123.
- correcting defects, by recording affidavits, 126.
- correcting defects, by suit to quiet title, 163.
- defective abstracts as defense in specific performance suit, 247.
- defects may be waived by vendee, 248.
- distinction between marketable and merchantable title, 120.
- distinction between "good title" and "good title as shown by abstract," 120.
- doubtful title, what is, 120.
- examination of, 3, 25.
- how soon furnished, 25, 259.
- illustrative cases, clouds on the title, 122.
- length of time for examination, 25.
- merchantable, when is, 120.
- marketable title, what is, 120.
- provisions in contract, regarding, 4, 9, 25, 68, 120.
- what company shall certify, 3, 25.
- where contract is silent as to kind of title, 121.
- who defrays expense incident to furnishing, 3, 9, 25.
- who to furnish, 9.

ACCEPTANCE:

- by letters, 20.
- by telegraph, 20.
- must be unqualified, 20, 22 N.
- sufficiency of, 20, 22.
- withdrawal of offer before, 22.
- suit for specific withdrawal of offer before, 22.

ACKNOWLEDGMENTS:

- see Forms:
- defective when recorded effect of, 110.
- defective acknowledgments curative statutes, 110
- forms of, 107, 108, 110.

[References are to Pages]

form of and statutory provisions, 107.
necessity of, if land contract recorded, 105.
not necessary to make contract valid, 47, 105.
not obligatory in land contracts, 105.
notarial seal when required, 108.
of contracts executed in foreign countries, 109.
of contracts executed in other states, 108.
of written instruments executed outside the state, 108.
when vendor is corporation, 50, 106.
who may take, 105.

ACTIONS FOR FRAUDULENT MISREPRESENTATIONS:

see "Fraudulent Misrepresentations," "Damages," "Rescission."

ADJUSTMENT:

of assessments at closing of transactions, 2, 9.
of rentals, taxes, etc., at closing of transaction, 2.

ADMINISTRATOR:

administrator takes nothing where vendees are husband and wife, 102.
deed, form of, under land contract, 280.
interest of vendee passes to heirs not administrator, 99.
may execute deeds in discharge of land contracts without order of court, 272.
specific performance against form of bill of complaint, 269.
specific performance in Probate Court by, 273.
vendor's interest passes to administrator, 99.

ADVERSE POSSESSION:

acts which will establish, 130, 131, 132.
action to establish, of record, 130.
affidavits establishing, 130, 131.
against municipality, 143.
against persons under legal disability, 130, 131.
against state, 143.
as basis of suit to quiet title, 165, 166.
as method of acquiring title, 165, 166.
bill of complaint to quiet title to easement obtained by adverse possession, 186, 132.
by one cotenant against another, 134, 135.
dangers of title by, 130, 131.
establishing title of record by, 130.
easements obtained by, 172.
five year period when sufficient, 133.
special statutes of limitations, 133.
tacking successive possessions, 130, 131, 143.
title obtained through, when marketable, 136, 120, 121.

[References are to Pages]

title obtained through, not marketable of record, 130.
vendee against vendor, 136.
wild and unoccupied lands, 136, 137, 138.

AFFIDAVITS:

correcting defects of record by, 126, 127, 129.
discharging mortgages by, 123, 124, 125.
forms of, 126, 127.
statutory provisions covering, 126, 127.
what defects may be remedied, 126, 129.

AGENT AND PRINCIPAL:

see "Principal and Agent."

AGENCY:

agency contract distinguished from option contract, 576.
agency contracts not within statute fraud, 17.

AGREEMENTS PRELIMINARY:

see "Index to Forms," "Statute of Frauds," "Specific Performance,"
"Land Contracts," "Options."
actions at law on partly performed verbal agreement, 56.
agreement held insufficient, 38 to 48.
agreements held not within the statute of fraud, 17.
agreements held sufficient, 30 to 38.
agreements verbal partly performed, 38, 48, 50, 51.
care required in drafting, 3, 17.
consideration need not be stated, 105.
counsel acting in dual capacity in drafting, 6.
description in, held insufficient, 28.
description in, held sufficient, 27.
effect of omitting to state when possession will be given, 25 N.
effect of void agreement under statute of fraud, 48, 48 N, 49.
equitable estoppel relation to part performance, 52, 295, 310.
essential elements of, 27.
evidence, required partly performed verbal agreements, 51.
executed on Sunday but pre-dated, 52, 295, 310.
failure of purchaser to execute memorandum, 48 N.
failure to provide terms of payment, 48 N.
form favorable to vendee, 67.
form favorable to vendor, 68.
forms of agreement, see "Forms," 66.
importance of, 24, 3, 2.
loss by fire after execution and pending closing, 58.
may consist of letters, telegrams, etc., 20, 14.
must be in writing, 12, 13, 14.
part performance verbal contracts acts insufficient, 55, 56.

[References are to Pages]

part performance verbal contracts what acts sufficient, 52, 55.
 partly performed verbal agreement must be complete in itself, 49 N.
 provisions should contain, 24, 3.
 purpose of, 3.
 relief refused, because of uncertainty of contract, 51.
 subjects to be dealt with in, 25.
 sufficiency of tender of performance, 60.
 void verbal agreements not admissible in evidence, exceptions, 50,
 48 N.
 void verbal agreements, recovery of money paid under, 49.
 void verbal agreements, using as measure of damages, 48 N.
 void preliminary agreements effect of, 60, 49, 48 N.
 when partly performed verbal agreement will be enforced, 48 N, 50,
 51, 49.
 where disposal of preliminary agreement in escrow advisable, 57.

AMBIGUITY:

of terms in land contract effect of, 51 N.

APPEAL:

from Probate Court decree, 274.

ASSESSMENTS:

adjustment of, 2, 9.
 should be dealt with in preliminary agreement, 2.
 who shall pay, 3, 9.

ASSIGNMENT:

see "Assignment of Land Contract."
 to vendee of leases and agreements on property purchased, 9.

ASSIGNMENT OF LAND CONTRACT:

forms of (see "Index to Forms").
 provision in contract covering, 8.
 substitute for clause prohibiting assignment, 8.
 short form with vendor's consent, 91.
 validity of cause against assignment, 346 to 356.
 waiver of right to object to assignment, 322.
 where vendor has himself breached the agreement, 244.
 wife of vendee need not execute assignment, 100.

ATTORNEY'S FEES:

refusal of courts to allow, 316.
 who shall pay in real estate transaction, 3.

AUCTION SALE:

clerk's memorandum in, 15.

AUDITOR GENERAL:

when party to suit for quieting title, 169 N, 170.

[References are to Pages]

BILL OF COMPLAINT:

forms of bills of complaint, see "Forms, Index to"; see also "Briefs Used in Late Michigan Cases", "Foreclosure of Land Contracts", "Quieting the Title", "Reformation of Instruments", "Specific Performance".

prayer for summons not required, 166, 173.

replication abolished, 166, 167.

specific performance arising from written agreement, 177, 179, 181, 182, 183, 186, 263.

statutory provisions covering in suits to quiet title, 168.

the terms "Complainant" and "Register in Chancery" abolished, 166.
to quiet title to real estate:

by heir at law not in possession, 176.

when defect arises from error in description, 177.

when defect arises from improper averments in deed, 177.

when defect arises from land on record, 181, 182.

when defect arises from misdescription of land, 177.

when defect arises from quit-claim from vendee, 183.

when defect arises from tax titles, 169, 177, 179.

when defect arises from unfulfilled agreement, 173, 176.

what averments not required in, 166.

when demurrable and when not, 175, 176.

BOUNDARIES:

misrepresentation concerning, 495.

suit to quiet title not proper remedy to determine, 174.

BREACH OF CONTRACT:

effect of first substantial breach, 244, 312.

BRIEFS USED IN LATE MICHIGAN CASES:

Banski v. Milchalski (204 Mich. 15), involving fraudulent misrepresentations, equity, 522.

Barnhardt v. Hamel (207 Mich. 232), involving fraudulent misrepresentations, law, 546.

Bignell v. Franks (212 Mich. 236), involving foreclosure of vendor's lien, 418.

Birney v. Ready (216 Mich. 7), involving specific performance, 282.

Clark v. Johnson (214 Mich. 578), involving reformation of land contracts, 455.

Cooper v. Pierson (212 Mich. 659), involving statute of frauds, 62.

Hubbel v. Ohler (213 Mich. 664), involving forfeiture of land contracts, 385.

LaBlanch v. Perron (209 Mich. 329), involving reformation of land contracts, 470.

Lian v. Bradford (204 Mich. 172), involving fraudulent misrepresentations, law, 539.

[References are to Pages]

- Lozon v. McKay (203 Mich. 364), involving forfeiture of land contracts, 372.
Lyle v. Munson (213 Mich. 250), involving specific performance and equitable estoppel, 295.
Moore v. Provost (205 Mich. 687), involving remedying defects in title, 204.
Nelson v. Breitenwischer (194 Mich. 30), involving foreclosure of vendor's lien, 440.
Ogooshevitz v. Sampson (211 Mich. 180), involving statute of frauds, 61.
Security Investment Co. v. Meister (214 Mich. 337), involving remedying defects in title, 188.

BROKERS:

- acts which may sustain suspension or revocation of license, 564.
administrator or executor or person selling under court order need not procure broker's license, 559.
annual renewals of license, 564.
application for license for business-chance broker, 560.
application for license where filed, 559.
application for license for real estate salesman, 562.
application, form of, 559.
business-chance broker, definition, 558.
barred from suing upon quantum meruit for services if agreement not in writing, 566.
cannot act in dual capacity without consent of both principals, 567, 568.
cannot collect commission before consummation of sale, 570.
chance broker must procure license, 558.
employed to sell property cannot become purchaser of, 568.
not excused for fraudulent conduct, 568.
commission agreement, 565.
commission agreement, contents of, 565.
commission agreement must be in writing to satisfy statute of frauds, 565.
commission applies to purchase as well as sale, 565.
commission payable to broker must be set up in contract, 568.
complaint against broker, 564.
complaint against broker should be verified, 564.
definition of, 558.
dual capacity of, must have consent of both principals, 567.
duties of broker, 567.
duties of commission to investigate complaints, 564.
effect when commission agreement is not in writing, 565.
fees accompanying annual renewals of license, 564.
fees accompanying applications, 564.
findings of commission may be reviewed by supreme court, 564.

[References are to Pages]

- holder of power of attorney from owner need not procure license, 559.
- implied authority of broker, 567.
- liability for commission not evaded by client's refusal to consummate sale, 565.
- must act for his principal alone, 567.
- not to draft agreement, 3.
- notes in payment of commission, 570.
- ordinary authority of broker, 567.
- owner need not procure license, 559.
- promise by one principal to pay commission to other principal's broker void, 568.
- provisions in statute of frauds covering, 565.
- real estate brokers, definition of, 558.
- real estate broker must procure license, 559.
- real estate salesman, definition of, 558.
- real estate salesman must procure license, 559.
- receiver or trustee in bankruptcy need not procure license, 559.
- regulation and licensing, 558.
- rule governing knowledge of restrictions, 569.
- suspension or revocation of license, 564.
- termination of commission agreement, 566.
- when acting in dual capacity must disclose facts, 567.
- when agreement void for want of consideration, 568.
- when broker acts in dual capacity without knowledge and consent of both principals, 567.
- when broker's commission limited by degree of success in making bargain, 570.
- when broker has not exclusive agency, 568.
- when broker is procuring cause of sale or lease, 569.
- when broker may collect commission from both principals, 568.
- when commission accrues, 566.
- when commission earned, 568.
- when contract voidable, 568.
- when defendant relieved from paying commission, 570.
- when liable in suit for accounting in case of fraud, 567.
- when notes in payment of commission void for want of consideration, 570.
- when vendee pays broker's commission, 570.

BUILDING RESTRICTIONS:

see "Specific Performance."

clouds on title created by, 249.

specific performance, purchaser may enforce, against all in subdivision, 249.

[References are to Pages]

CAPACITY OF PARTIES:

- natural incapacity, 104.
- mental, 103.

CAPIAS:

- false representations, actions for, 501.

CIRCUIT JUDGE:

- order made by, 168.

CLOUDS ON TITLE:

- see "Abstracts of Title," "Quieting the Title."
- actions to remedy, 164.
- assignments of land contracts constituting, 150.
- assignments of land contracts causing, 150.
- building restrictions, 249.
- bills of complaint for quieting, see "Forms, Index to."
- certificate of sale, constituting, 123.
- creditor's interests creating, 123, 150.
- definition of, 122.
- defective acknowledgments of married women constituting, 123.
- defective deed constituting, 123.
- decisions from other states covering, 122.
- decree quieting, see Index to Forms, 181.
- defects most common, constituting, 169.
- defects of record creating, 126.
- easements constituting, 122.
- execution sale, 123.
- effect of decree to quiet, 181.
- equity, pleading and practice covering, 166, 167.
- forms of bill of complaint to quiet, 182, 183, 186.
- foreclosure of mortgage, 147.
- growing out of foreclosure of mortgage by advertisement, 146.
- how corrected, 3, 123, 129.
- judgment constituting, 123.

CONSENT:

- of vendor to assignment, of contract of necessity, 346, 356.

CONSIDERATION OF CONTRACT:

- inadequacy of, 236.
- interest, taxes and repairs, constituting, 248.
- may be proved by legal evidence, 105.
- need not be stated in contract, 105.
- one dollar constituting, 248.
- Michigan rule as to adequacy of, 236.
- personal service constituting, 239.
- statutory provisions covering, 105.

[References are to Pages]

sharp practice evidenced by, 237.
son's services constituting, 247.
specific performance affected by, 238.
support of parent constituting, 247.

CONTRACT:

see "Land Contracts" and "Agreements Preliminary", "Statute of Frauds."

CONTRACT OF SALE:

see "Agreements Preliminary" and "Land Contracts", "Statute of Frauds."
distinction between option contract and, 576.

COTENANTS:

Michigan rule governing, 134.
statute of limitations governing, 135.

COUNTY CLERK:

formerly register in chancery, 168.

DAMAGES:

awarding damages in lieu of specific performance, 234, 261, 303 N.
awarding damages in part and specific performance as to remainder, 234, 261, 503 N.
for fraudulent representations concerning property, 509.
measure of, in action by vendee growing out of breach of contract, 509.
no necessity for acting promptly where only damages sought, 557.
no necessity for rescinding where property retained and damages sought, 557.
rescission in part and damages for remainder, 503 N, 546, 557.
retaining property and setting off damages against purchase price, 546 to 557 incl.
sought by bona fide purchaser, 57.
special, when allowed, 509.
speculative, what is, 509.
the rule when vendor acts in bad faith, 509.
the rule when vendor acts in good faith, 509.
void agreement, right to damages, 48, 56.
what constitutes breach of contract, 509.
when vendee is entitled to for breach, 509.
when vendee not entitled to for breach, 509.

DECREE:

for forms, see "Forms, Index to."
amendable in supreme court to conform to facts, 259.
certified copy of shall be filed in Register of Deeds office when quieting title to lands, 181.

[References are to Pages]

effect of registration, 181.
 may be set aside by defendant not having notice, 171.
 may terminate and discharge liens, 181.
 registration of probate or chancery decree, 275.
 shall determine the rights of the parties, 181.
 specific performance, 259.
 to defendant on cross bill, 172.
 when wife has not joined in execution of land contract—specific performance, 234.

DEED:

by administrator, executor or guardian, 272.
 cancellation of, 502.
 defects in, 123, 134.
 delivery of, 58 N.
 dower interest of wife in, 147.
 good and sufficient warranty, meaning of term, 121 N.
 in escrow, where should be deposited, 57, 249.
 signature of wife to, 147.
 title through tax deed—marketable, 146.
 unrecorded, 144.

DEFAULT:

course open to vendor upon default by vendee, 312 to 343 incl.
 effect of first breach, 244, 312.
 of what default may consist, 315.
 of vendee under land contract, 69, 312, 343.
 of vendor under land contract, 244, 312, 9.
 waiver of default, 232, 322.

DEMURRER:

in suits to quiet title, 175.
 sustained when bill of complaint fails to state whether either party is in possession, 175.

DISCHARGE:

for form of discharge, see "Forms, Index to."
 of land contract of record, 112.
 of ancient mortgages, how obtained, 123, 127, 128.
 penalty for refusal to execute discharge of land contract, 112.
 who shall execute discharge of land contract of record, 112.

DOWER:

as consideration for transfer of property, 249.
 contracts releasing dower specifically performed, 260 N.
 of widow of vendor in land contract, 99.
 of widow of vendee in land contract, 100.
 pre-nuptial agreements barring dower will be specifically performed, 260 N.

[References are to Pages]

wife of vendee, no dower, 100.

wife of vendor should execute land contract to bar dower, 99.

wife of vendee need not execute assignment of land contract except in certain cases, 100.

EASEMENT:

for forms, see "Forms, Index to."

quieting title to, 204.

remedy in equity to establish, 172.

when third parties claim, creates cloud on title, 122.

EJECTMENT:

advantages of, to vendor to obtain possession, 324.

action by vendor, 325, 324.

changes in recent statutes relating to, 326.

contents of declaration in, 327.

disadvantages of remedy to vendee, 325.

declaration in, 325, 326.

defendants in action of, 326.

defendant, occupancy of premises by, 326.

fictitious names of parties in, 326.

homestead interests involved in, 326.

judgment, when conclusive, 326.

law, commenced at, 326.

landlord and tenant, 327.

mortgagees not proper parties in, 326.

new trial not granted defendant in, as matter of right, 326.

proceedings wholly statutory, 325.

personal service on defendant, 326.

proceedings not barred after 10 years' occupancy of premises in absence of adverse possession, 327.

remedy involves legal right only, 151, 326.

remedy does not involve equitable interests or defenses, 326.

service, 326.

vendee estopped from denying vendor's title, 328.

when mortgagees must be parties in, 326.

when vendee not estopped from denying vendor's title, 329.

when vendee acquires paramount title, 329.

when vendee becomes trustee for vendor, 329.

when plaintiff fails to join all defendants, 327.

ENCUMBRANCES:

false representations relative to, actionable, 494.

who assumes, 7, 25.

EQUITY:

for forms used in equitable actions, see "Forms, Index to," "Equity,

[References are to Pages]

- Pleading and Practice," "Specific Performance," "Foreclosure of Land Contracts," "Reformation of Instruments."
- equitable estoppel, specific performance granted because of, 296, 310.
- fire insurance, rule in equity, 58.
- inequitable conduct of defendant, grounds for enforcing void contract), 296, 310.
- jurisdiction in action to quiet title, 122, 164, 166.
- jurisdiction in action involving fraud, 52, 502.
- jurisdiction in action involving mistake, 449, 452.
- jurisdiction in action involving void judicial sale creating cloud, 175.
- jurisdiction in cancellation of land contracts, 502.
- jurisdiction in establishing easement, 172.
- jurisdiction in establishing boundary line, incidental, 174.
- jurisdiction in establishing lien on property for purchase under void judicial sale, 175.
- jurisdiction in forfeiture of land contracts, 339.
- jurisdiction in cases for injunctive relief, 173.
- jurisdiction in reformation of land contracts, 449, 452 incl.
- jurisdiction in restraining actions at law, 173.
- jurisdiction in rescission of land contracts, 502.
- jurisdiction of, in specific performance, 245.
- may constitute perpetrator of fraud trustee for injured party, 502.
- no jurisdiction in action to quiet title if bill of complaint shows defendant in possession, 166.
- not available in irregular levy of execution, 176.
- relief denied when facts fail to warrant rescission, 235.
- relief granted where defendant estopped by inequitable conduct, 296, 310.
- rule in case of fire insurance pending closing of deal, 58.
- trespass upon lands not in possession of defendant, 174.
- when jurisdiction concurrent with courts of law, 502.
- when remedy will be entertained in, 164.
- when possession a necessary element in, 173.
- when wife refuses or fails to join in execution of land contract, 234.

EQUITY OF REDEMPTION:

- form of decree for, see "Forms, Index to."
- time allowed in summary proceedings, 325, 369.
- what time allowed under land contract sale, 404.

EQUITY, PLEADING AND PRACTICE:

- see the various equitable actions.
- changes in equity, pleading and practice, 166.
- designation of moving party, 168.
- exhibits used in, may be attached to pleading, 167.
- judicature act relating to, 166.
- replications abolished, 167.
- rules of supreme court relating to, 166.

[References are to Pages]

ESCROW:

- agreement, preliminary, not necessary, 57.
- form of escrow memorandum for the disposition of a land contract in escrow, 73.
- requirement of statute of frauds, as to release, 20.
- when disposal of land contract in escrow advisable, 57.

ESTATE BY ENTIRETIES:

- heirs to take no interest in, 101.
- husband and wife as vendees under land contract held by, 101.

ESTATE, CHARACTER OF:

- see "Land Contracts," "Husband and Wife," "Vendee," "Vendor," "Dower."

ESTOPPEL:

- equitable, from forfeiture for violation on non-assignment clause, 346.
- relating to ejectment proceedings, 328.
- relating to foreclosure of vendor's lien, 406.
- relating to waiver, 346.

EXPECTANT INTERESTS:

- law looks with disfavor upon sale of, 116.
- requirements for enforcement of, 116.
- sale of, 116.

EVIDENCE:

- see "Foreclosure of Land Contract," "Forfeiture," "Fraudulent Misrepresentation," "Land Contracts," "Quieting the Title," "Reformation of Instruments," "Specific Performance."
- abstract admissible to show character of title, 120 N.
- affidavits when prima facie, 129 N.
- adverse possession of unoccupied property evidence to establish, 136 N.
- burden of proof, 165, 169, 174.
- conversation between defendant's agent and his attorney inadmissible, 259.
- defective title, proof of, 122 N. 11.
- false representations contained in circulars, 499.
- land contracts, 111.
- memoranda, exclusion of, in, 260.
- miscellaneous decisions, 259.
- mortgage, evidence necessary to prove discharge of mortgage, 125.
- parol, 23, 449, 450.
- proof of document and how made, 111.
- parol testimony admissible to establish mistake in land contract, 450.
- reformation of land contract, 452.
- specific tax must be paid before contract is admissible, 115.

[References are to Pages]

tax deed not of itself *prima facie*, 166.

trial court superior opportunity to determine credibility of witnesses, 439.

EXECUTION OF LAND CONTRACTS:

certificate of sale under, 123.

curative statutes as to defects, 110.

effect of failure of wife to sign, 234.

effect of failure to have same witnessed, 110.

effect of failure to have same acknowledged, 105, 110, 111.

remedy when defective, 110.

statutory requirements of, 104.

witness to vendor's signature, 104.

wife need not join in assignment to bar her dower, 100.

FIRE:

before possession and after, 58.

fires before and after possession, 58.

insurance collected by whom, 58.

loss sustained by whom, 58.

FIVE YEAR STATUTE:

effect of void tax deed, 133.

purpose of statute, 133.

sale by executor of administrator, 133.

sale by guardian or testamentary trustee, 133.

sale by sheriff or other officer, 133.

FORECLOSURE OF VENDOR'S LIEN:

actions waived by pursuing foreclosure, 406.

actions at law for purchase price concurrently with, 406.

advantages of remedy, 324.

advertising property for sale, 404.

affidavit of posting notices for sale, 413.

briefs and pleadings used in late Michigan cases, 418.

circuit court commissioner report of sale, 414.

circuit court commissioner statement of fees, etc., 417.

commissioner's deed, 411.

concurrent with action at law for purchase price of land contract, 406.

decree of foreclosure, 411.

defendants, who should be, 405.

disadvantages of remedy, 324.

foreclosure proceedings not governed by mortgage statutes, 404.

forms pertaining to this action, see "Forms, Index to."

lessee of vendee should be made party, 405.

nature of action of, 403.

notice of sale by circuit court commissioner, 413.

nature of vendor's lien, 403.

[References are to Pages]

of vendee's lien, 405.
parties to the action, 405.
plaintiff must not be guilty of breach to maintain action, 405.
pleadings and briefs used in late Michigan cases in, 418.
receipts from circuit court commissioner, 418.
statute of limitations barring, 439.
time allowed to redeem, 404.
vendee's interest, how divested, 404.
vendee's lien, 405.
vendor's claim under land contract merely a money debt, 403.
vendor's interest in contract an equitable charge on the land, 403.
vendor's interest in land contract not a legal estate, 403.
vendor in land contract holds legal title, 403.

FORFEITURE:

for forms, in relation to, see "Forms, Index to."
actions in ejectment after, by vendor or vendee against third persons, 329.
actual damage sustained under, 315.
attitude of Michigan supreme court relative to, 315.
assignment of contract does not release vendee, 353.
advantages taken by vendor over vendee in, 353.
basis for determination in cases involving, 353.
clause relating to, in land contract, 68.
courts, criterion in granting relief, 344.
contracts containing non-assignment clause, 346.
damages stipulated in contract, 315.
damages sustained under, 315.
decree of, 342, 397.
ejectment or summary proceedings must be preceded by notice of forfeiture, 319.
effect of demand for payment after declaration of, 322.
effect of waiver of, 322.
ejectment after, 324.
estoppel, after verbal consent to assignment, 347.
effect of final judgment—possessory proceedings, 338.
effect of registration of writ of restitution, 339.
enforcement of, 315.
definition of, 315.
forfeiture clause strictly construed, 346, 352.
forfeiture and penalties, how regarded, 315.
for violation of non-assignment clause, 346, 353.
hateful to the law of Michigan, 315, 339.
how effected, 339.
interest of vendor under land contract, 'personal property, 354.
incidents in relation to proceedings, 331.
jurisdiction of equity in, 339.

[References are to Pages]

leases and relation to assignment clause, 347.
liquidated damages under, 315.
Michigan decisions relating to non-assignment clause, 349.
mere breach does not constitute, 315.
notice of, must be given, 319.
non-assignment clause, violation of, as ground for, 346.
non-assignment clause against public policy, 353.
non-assignment clause not against public policy, 353.
necessity of tender for relief from, 368.
necessity of tender, 368.
not sustained, cases illustrating, 356.
purpose of decree of, 339.
pleadings and briefs in late Michigan cases involving relief from,
372, 384.
penalty under, 315.
plea in summary proceedings, 331.
proceeding to have, decreed, 339.
provisions of contract relative to, 312.
public policy, attorney fees, notes, mortgages, 356.
public policy, definition of, 356.
relief from, bill of complaint, 369.
relief from, after final judgment by circuit court commissioners, 369.
relief from, necessity of tender, 368.
relief from, granted, 356, 363.
relief from, denied, 363 to 368.
repossession by vendor, declaration of, 320.
return on appeal, 337.
restraint against alienation of real property, 355.
service where defendant cannot be found, 332.
steps in appeal from circuit court commissioners, 333.
summary proceedings by vendor for possession, 330.
summary proceedings steps, 324.
sustained, cases illustrating, 363, 367.
time allowed to redeem, in relief from, 368, 369, 356 to 361.
time allowed to redeem, summary proceedings, 369.
validity of non-assignment clause, 346.
vendee is equitable owner of real estate under land contract, 354.
vendor guilty of breaches of contract, 347.
vendor has right to select his vendee, 353.
vendor holds title as security, 354.
vendor's conduct constituting waiver of non-assignment clause, 347.
vendors' interest analogous to interest of mortgagee, 354.
vendor's waiver of, 347.
voluntary surrender of possession, after, 324.
waived by filing bill to foreclose vendor's lien, 324.
waiver of by oral agreement, 322.

[References are to Pages]

- waiver of, or default, 322.
- waiver of, by conduct, 322.
- waiver of, or default by foreclosure, 347.
- waiver of notice of, 320.
- when assignment is not accompanied by change of possession or ownership, non-assignment clause is not violated, 347.
- when contract contains forfeiture clause, 345.
- when courts of equity grant relief, 344.
- when defendant has made great improvements, paid taxes, etc., 344.
- when forfeiture results in great loss to vendee, 344.
- when forfeiture results in great loss to vendor, 344.
- when guardians may exercise, 317.
- when legally effected, 339.
- when litigation involving title is concerned, 344.
- when notice of, not required, 320.
- when one of parties dies, 317.
- when one of parties has been adjudged incompetent, 317.
- when vendee's laches are not great, 344.
- when vendor accepts payments from assignee, waiver of right of, 322.
- when vendor commences foreclosure against vendee and assigns, 347.
- when vendor gives verbal consent to assignment, 347.

FRAUDULENT MISREPRESENTATIONS:

- see "Damages," "Equity," "Index to Forms," relating to, "Rescission," "Reformation of Instruments," "Specific Performance."
- actions at law, 539 to 557.
- actions in equity, 523 to 539.
- actions on the covenants or warranties, 504.
- acts of defendant giving rise to action must be averred, 512.
- actions for, not assignable, 173.
- allegations in declaration constitute separate paragraphs, 520.
- answer or counterclaim, 514.
- at law, actions for, 503.
- bill of complaint, contents of, 512, 513.
- bill of complaint, form of, see "Index to Forms."
- bill of complaint should disclose when fraud was discovered, 513, 514.
- briefs, covering, see "Briefs Used in Late Michigan Cases," *infra*.
- cancellation of contract, 503.
- cancellation of deed, 502.
- concealment of encumbrance, 494.
- constituting value of land as equitable lien thereon, 503.
- constituting perpetrator of fraud trustee for injured party, 502.
- copy of deed or contract should be attached to bill of complaint as exhibit, 513.
- copy of written instruments should be attached to declaration, 520.
- court of law cannot cancel or rescind contract or deed, 503.

[References are to Pages]

cross bill in suit for cancellation of deed cannot be based on breach of covenants, warranty, or encumbrance in the deed, 514, 515.
for forms, see "Index to Forms."
damages, see "Damages," recovery of.
damages for breach of contract, 509.
damages because of, 509.
damages to which purchaser is entitled, 509.
damages to which vendor is entitled, 509.
declarations, 519.
declaration in action at law, 520.
deed or contract need not be incorporated in bill of complaint, 513.
defendant's defenses must not be inconsistent with each other, 514.
defendant may counterclaim, 514.
delay must be brief after discovery of fraud, 505.
delay need not be brief in action at law, 557.
description of instruments, 513.
disposition of rents and use of property in rescission of contract, 508.
equity will rescind because of defective title, 493.
executed contract or sale of real estate in absence of fraud, 504.
exhibits, 513.
forms of bill of complaint and declaration, see "Forms."

FRAUDULENT MISREPRESENTATIONS IN PARTICULAR:

concealment of encumbrance, 494.
concerning annual expense, 497.
concerning boundaries, 495.
concerning condition, 499.
concerning income, 497.
concerning improvements, 491, 499.
concerning encumbrances, 494.
concerning location, 495.
concerning quality, 499.
concerning title, interest, 493.
concerning value, 497.
concerning condition of soil, 499.
distinction between opinions and facts, 490.
essential elements of, 487.
expression of opinion, 490.
false representations as to legal rights, 489.
general principles, 487.
"Ignorance of the law no excuse," 489.
made by vendor's agent, 489.
materiality of representations, 489.
must be material to transaction, 489.
promises as to improvements or use of real property, 491, 499.
rescission of land contract, because of, 489.
representations as to matters of law, 489.

[References are to Pages]

- representations as to quantity, boundaries or location, 495.
- representations as to quantity, condition and improvement, 499.
- representations as to title interest, 493.
- representations as to value, 497.
- when silence constitutes, 491.
- writ of Capias ad Respondendum, because of, 501.
- general rule governing tender in rescission for fraud, executory contract, 508.
- general rule governing remedies of vendor, 510.
- general rule governing, 512.
- general requirements of pleadings, 512, 519.
- injuries suffered by breach of condition subsequent, 504.
- jurisdiction of equity, 502.
- Michigan circuit court rule governing, 513.
- must be no adequate remedy at law when relief is sought, in equity, 512.
- measure of damages, 509.
- measure of damages in, see "Damages."
- measure of damages in action by vendee growing out of breach of contract, 509.
- multiplicity of suits, 503.
- new rules and law covering, 519.
- no necessity for acting promptly when rescission not sought, 557.
- no necessity for acting promptly where only damages are sought, 557.
- non-disclosure or concealment, 494.
- no necessity for rescinding where property is retained and damages sought, 557.
- offer to restore or do equity, 508, 514.
- offer to restore equity, must be set up in bill of complaint, 514.
- plaintiff must not be guilty of laches, 505.
- plaintiff waives question of fraud by retaining possession, 507.
- plaintiff may show his delay due to deceitful representations of defendant, 506.
- pleadings and briefs used in late Michigan cases, (Equity), 539.
- pleadings and briefs used in late Michigan cases, (Law), 546.
- Pleadings and Briefs, List of Cases:
 - Banski v. Michalski (204 Mich. 15), involving fraudulent misrepresentations (Equity), 522.
 - Barnhardt v. Hamel (207 Mich. 232), involving fraudulent misrepresentations (Law), 546.
 - Lian v. Bradford (204 Mich. 172), involving fraudulent misrepresentations (Law), 539.
- profert not required, 513.
- requirements of person seeking, 508.
- remedy at law does not defeat agreed consideration in equity, 503.
- rescission of contract, 487.

[References are to Pages]

restoration of status quo, 508.
 remedies by action at law, 503.
 requisites of declaration, 519.
 separate counts in declaration, 522.
 suit for damages in action at law, 503.
 time limit for rescission, 505.
 time in which action may be brought, governed by circumstances, 505
 time to rescind, 505.
 waiver of right to rescind by acts or assertions of ownership, 507.
 when remedy at law is adequate equity will not interfere, 504.
 when remedy at law is not adequate, 502.
 when bill in equity for cancellation of conveyance is not the proper
 remedy, 504.
 when delayed action is not barred by laches, 506.
 when delayed action for rescission operates unfairly to defendant and
 confers greater benefit upon plaintiff, 506.
 what answer and cross bill should contain, 514.
 when false statement is equally within knowledge of vendor, no
 basis for relief, 510.
 when vendee conceals material facts, 511.
 when vendee misrepresents property given in exchange, 511.
 when equity will relieve vendor at instance of vendee's non-disclosure
 and concealment, 511.
 when concealment does not constitute fraud, 511.
 waiver of right to rescind by acts or assertions of ownership, 507.
 when equity will not interfere, 503.
 when equity will not rescind contract, 504.
 when vendor is insolvent, 503.
 when subject matter is only security for purchase price paid, 503.
 when contract for sale of land has been executed and delivered to
 vendee, 508.
 when person seeking rescission for fraud must restore possession, 508.

FRAUD AND MISTAKE:

see "Fraudulent Misrepresentations," "Reformation of Instruments,"
 "Rescission," and "Specific Performance."

GUARDIAN:

may convey real estate pursuant to land contract, 275.

HEIRS OF DECEASED PERSONS:

affidavit for substituted service, in suits against, 171.
 appointing guardian ad litem, in suits against, 171.
 bill of complaint, to join unknown heirs, 177.
 decree, form, in suits against, 179.
 form of averment, in suits against, 177.
 Michigan rule covering, 134.

[References are to Pages]

rights of, relating to adverse possession, 131.

specific performance by, 249.

unknown heirs as defendants, 170.

HUSBAND AND WIFE:

see "Land Contracts," "Agreements Preliminary," "Dower," "Vendor," "Vendee."

Awarding damages against husband for failure of wife to join in contract, 234.

bill of complaint to quiet title may be filed by wife when levy is made on homestead, 176.

character of interest, when vendees are, under land contract, 101.

estate by entireties, when vendees are, 101.

mutual releases between, upheld, 103.

specific performance by husband against wife, 249.

specific performance against husband where wife fails to join, 234.

when wife of vendee must join in assigning contract, 100.

when both named as vendees, survivor takes all, 101.

where property is homestead, 100.

wife need not execute assignment of contract to bar her dower, 100.

INEQUALITIES OF EQUITIES:

see "Specific Performance," "Equity."

when caused by unforeseen difficulties in enforcement of terms of contract, 237.

where defendant acted under pressing circumstances, 238.

where defendant was old and poverty stricken, 238.

where defendant was inexperienced, 238.

INTEREST IN REAL ESTATE UNDER LAND CONTRACT:

see "Vendor," "Vendee," "Husband and Wife," "Dower," "Land Contracts."

described in agreement, 3.

dower of widow in vendee's interest, 100.

dower of widow in vendor's interest, 100.

when title in administrator, 99.

when title in heirs of decedent, 99.

INTEREST ON MORTGAGE:

when assumed by vendee, 9.

when not to exceed interest under contract, 9.

INTOXICATION:

when basis for denial of specific performance, 234.

when induced by plaintiff, 234.

when not induced by plaintiff, 234.

INSURANCE:

effect of change of ownership, 58.

[References are to Pages]

precautions relating to policies of, 9.
 vendee's obligation, 7, 9.
 vendee's interest should be covered by, 9.

INTRODUCTORY STATEMENT, 1.

LACHES:

see "Fraudulent Misrepresentation," "Rescission," "Specific Performance,"
 after discovery of fraud, 505.
 defense in action for specific performance, 232.
 delay must be brief after discovery of mistake except in certain cases, 505.
 delay unimportant, in action for damages, 557.
 minor or incompetent not guilty of, 232.
 relating to rescissions of contract, 505.
 when delayed action not defense, 557.
 when delayed action not barred by, 557.
 when not injurious to other party, 506.
 when relief in equity precluded by, 505.
 when warranted by circumstances, 232.

LAND CONTRACTS:

see "Husband and Wife," "Dower," "Vendor," "Vendee," "Agreements Preliminary," "Foreclosure of Land Contract," "Forfeiture," "Fraudulent Misrepresentation," "Options," "Reformation of Land Contract," "Specific Performance," "Statute of Frauds."
 for forms, see "Forms, Index to."
 acknowledgment and registration of, 105.
 acknowledgment in other states or territory, 108.
 acknowledgment of, when executed in foreign country, 107.
 action at law to recover purchase price under, 312.
 ambiguity of terms, 232.
 assignments of, 89, 91, 257, 346.
 authentication of, when executed outside of state, 108.
 basis for computing specific tax on, 116.
 breach of, effect of first substantial, 244, 312.
 capacity of parties to execute, 103.
 certified copy of, as evidence, 111.
 consideration, 238, 236, 105.
 constructive notice of, where one in possession, 114.
 compliance with statute of frauds, 12.
 corresponding rights of parties under, 235.
 covenants against assignments contained in, 346.
 death of parties to, 272.
 defectively executed, curative statutes, 110.
 defendant's relief in forfeiture of, 312.
 defensive measures available to vendee in forfeiture of, 312.

[References are to Pages]

- defective forms of, 74.
- discharging of record, 112.
- disposal of, in escrow, 57.
- dower interest of wife of vendor in, 234.
- dower interest of wife of vendee in, 100.
- effect of vendee's voluntary surrender of, 312.
- effect of intoxication of parties when executing, 234.
- ejectment to obtain possession of land covered by, 324.
- enforcement of, in probate court, 273.
- equitable lien on premises for agreed value, 503.
- estoppel of vendee to deny vendor's title, 328, 329.
- excludes, preliminary agreements, see "Agreements Preliminary."
- executed outside of state, 108.
- execution of, statutory requirements, 104.
- executory, 238.
- foreclosure of vendor's lien under, 312.
- forfeiture clauses in, 312.
- forfeiture of, 312, 343.
- form of acknowledgment, 107.
- forms of, see "Forms, Index to."
- husband and wife, character of estate as vendees, 101.
- improvements in property covered by, 235, 358.
- inadequacy of consideration, 236.
- incapacity of parties to execute, 238.
- inequitable terms, effect of, 237.
- inequitable conduct of defendant, grounds for enforcing, 296, 310.
- inequities under, effect of, 237.
- intervention of rights of third parties, 257.
- intoxication of parties to, effect of, 234.
- lien for payments due vendor, under, 117, 403.
- lien on premises for agreed price, 503.
- mistake by draftsman in writing, 449.
- mistake or fraud basis for denial of specific performance of, 235.
- mistake or fraud of defendant grounds for granting specific performance, 296, 310.
- mutuality of parties to, 244.
- nature of foreclosure of, 312.
- nature of estate where vendees are husband and wife, 101.
- nature of estate created by, 98.
- neutralization of equities under, 234.
- non-assignment clause, violation of, 346.
- notice of contract, possession under is, 114.
- notice of forfeiture of, 319.
- personal service as consideration for, 238.
- possession by vendee constructive notice of contract, 114.
- possessory actions to regain premises, 312.

[References are to Pages]

- precautions necessary in execution of, 9.
- provisions of, in general, 3, 7, 8, 12, 24.
- purchase price under, lien for, 117.
- recovery of purchase price under, by vendor, 235.
- relief from forfeiture, 325, 404.
- reformation of, 450, 454.
- registration of, when property lies in two or more countries, 113.
- remedies available to vendor, under, 312.
- remedy for enforcement of, 227.
- remedies in case of breach, 312.
- remedies open to plaintiff after declaration of forfeiture, 312.
- repossession of premises under, 312.
- requisite of land contract, 228.
- sale of expectant interests under, 116.
- specific performance of, 312.
- specific performance of, by vendor against vendee, 235, 312.
- specific performance of (Michigan rule), 235, 312.
- specific performance not compelled as to dower, 234.
- specific tax on, 114.
- status of, in event of death of parties to, 272.
- status of, in event of mental incapacity, 272.
- statutory requirements of execution of, 104.
- suspended payments due under, 9.
- unfair, oppressive, or inequitable, 237.
- vendor's equitable lien for unpaid purchase price under, 117.
- vendor's lien and foreclosure of, 312.
- vendor's interest under, 9.
- vendor's title need not be marketable at time of sale, 146.
- when bargain is inequitable, 235.
- when consideration for, is personal service, 238.
- when contract is executory, 238.
- when courts will enforce, 227.
- when fraud or mistake not sufficient to rescind, 235.
- when incapacity of parties exists, 238.
- when inequities exist under, 237.
- when land is outside the state, 235.
- when non-enforceable but performed by plaintiff, 238.
- when personal service as consideration has been performed, 238.
- when plaintiff's promise is indefinite, 238.
- when silent as to sort of title, 121.
- when unfair, oppressive and inequitable, 237.
- when vendees are husband and wife, joined with others in, 102.
- wife of vendee, no dower interest in, 100.
- wife's failure to join in execution of, 234.

LANDLORD AND TENANT:

- Forfeiture of lease under non-assignment clause, 347.

[References are to Pages]

LAYMEN AND LEGAL INSTRUMENTS:

should not draft land contract, 6.

LEASE:

forfeiture of, under non-assignment clause, 347.

when defect in title created by, 123.

when exceeding one year, requirements of, 13.

LEGAL DISABILITIES:

statutory provisions for those under, 103, 131.

LIENS:

mechanic's, where title held under land contract, 117, 118.

precautions covering mechanic's liens, 10.

to what lien attaches, when title held under land contract, 117, 118.

see "Liens on Real Estate."

vendor's lien, 117, 119, 403.

LIENS ON REAL ESTATE:

assignment and enforcement of, 117.

how affected by bona fide purchaser, 117.

not confined to sale of legal or fee title, 117.

vendor's see "Vendor's Lien."

when agreed price of premises constitutes, 503.

when created by mortgage, 117.

LIFE ESTATE, 59.

LOSS:

insurance covering, 58.

preliminary agreement relative to, 2.

sustained before possession given, 58.

sustained after possession given, 58.

when caused by fire, 58.

when sustained by vendee, 58.

MARKETABLE TITLES:

see "Titles" quieting the title.

MARRIED WOMEN.

see "Acknowledgments," "Affidavits," "Dower," "Parties," "Land Contracts."

MECHANIC'S LIENS:

see "Liens."

MERCHANTABLE TITLES:

see "Titles."

MEMORANDUM OF AGREEMENT:

see "Agreements Preliminary," "Statute of Frauds."

[References are to Pages]

MENTALLY INCOMPETENT:

- capacity of parties, 103.
- effect of inequity, 237.
- statutory provisions concerning, 104.
- when defendant is, 237.

MICHIGAN SECURITIES COMMISSION:

- complaints against brokers considered by, 564.
- licenses to brokers, issued by, 554.
- supreme court may review finding of, 564.

MINORS:

- protection of, concerning property interests, 131.
- when action may be brought by, 148.
- when not guilty of laches, 232.
- when specific performance granted to, 232.

MISTAKES:

- see "Specific Performance," "Rescission of Contract," "Reformation of Instruments."

MISTAKE AND FRAUD:

- see "Specific Performance," "Fraudulent Misrepresentations."

MORTGAGE:

- assumed by vendee, 10.
- certificate of discharge of ancient, 128.
- defective title growing out of, 146.
- discharge of ancient mortgages, 128.
- executed by vendor after sale, 7.
- failure to make interested persons parties to suit for foreclosure of, defect in title, 147.
- foreclosure of, by advertisement, 146.
- interest of mortgagee in insurance, 10.
- lien created by, superior to vendee's interest, 7.
- petition for discharge, see "Forms, Index to."
- renewal of, 7.
- when limited to stated amount, 7.
- when power of sale not contained in, 146.
- when vendee may pay, 7, 9, 25.

MUNICIPAL CORPORATIONS:

- adverse possession by, 143.

MUTUALITY OF CONTRACT:

- application of, to option contracts, 244.
- application of, to option unilateral contracts, 244.
- contract signed by one party only, 244.
- exceptions to doctrine of, 244.

[References are to Pages]

Michigan doctrine of, 244.
specific performance, 244.
test of, 244.

NATURE OF ESTATE CREATED BY LAND CONTRACT:

at law, title in vendor, 98.
in equity, title in vendee, 98.
interest of vendee at death passes as real estate, 99.
interest of vendor at death passes as personal, 99.
where husband and wife as vendees joined with others, 102.
where spouse of vendee dies, 101.

NON-ASSIGNMENT CLAUSE:

forfeiture of contract for violation, 346.
substitute for, 8.

NOTICE:

actual possession, notice of holder's interest, 114.
necessity of, before ejectment, or declaring forfeiture, 319.
of adverse possession, 136, 142.
of assignment, 7, 89, 91.
of election to terminate contracts for default, 319.
of forfeiture, 319, 320, 324.
of forfeiture of land contract, 319.
of forfeiture clause, favorable to vendor, 68.
of forfeiture to cotenant, 134.
of petition in probate court for specific performance, 273, 274.
possession by tenant constitutes notice of landlord's rights, 114.
signs constituting, 137.
waiver of, in event of foreclosure, 320.

OPTION CONTRACTS:

advance payment to be returned insufficient to support, 574.
acceptance by tender in chancery, 587.
acceptance of, 577, 578, 587.
acceptance of offer, 574, 587.
action for breach arising under, 581.
against whom enforceable, 581.
assignability of, 577.
binding offer and enforcement of, 239.
comes within statute of frauds, 573, 575.
consideration for option distinct from price of land, 574.
consideration necessary to, 574.
consideration may be applied on purchase price, 574.
consideration supporting, 239.
damages for breach of, 581.
deduction of encumbrance from purchase price, 580.
definition of, 572.

[References are to Pages]

discharge, 578.
distinction between offer and option, 574.
distinguished from contract of sale, 576, 587.
distinguished from agency, 576.
doctrine of mutuality, 244.
effect of election or exercise, 579.
effect of election by optionee, 581.
effect of lack of mutuality, 583.
executory contract of sale arising from, 580.
expiration of, 578.
failure to specify time does not invalidate, 573.
forms of, 573.
formal requisites of, 573.
from owner to broker, 576.
not a sale of land, 572.
notice of election under, 580, 581.
notice of forfeiture, not required on expiration of, 578.
payment and tender, 579.
price must be sufficient under equitable rule, 239.
purchasers for value without notice of, 581.
purchase price, tender of, 579.
rescission of, by both parties, 578.
remedies, 581.
revocation of, 578.
revocation when operative, 578.
sale of land under, 577.
specific performance, 581.
tender of consideration for, 239.
terms of and manner of exercise, 579.
time of exercising, 577.
vests no title, 572.
when \$1.00 sufficient consideration to support, 574.
when contract becomes binding, 582.
when consideration need not be expressed, 575.
when followed by land contract, 239.
when heirs, devisees and representatives are liable under, 581.
when not assignable, 577.
when option from owner to broker terminated, 566.
when optionee abandons his rights under, 579.
when optionor obtains enforceable rights under, 581.
when tender of purchase price may be dispensed under, 579.
when third parties liable under, 581.
when specific time not stated, 577, 578.
when there are two or more vendors, 23.

[References are to Pages]

ORAL AGREEMENT TO SELL REAL ESTATE:

- no remedy at law when within statute of frauds, 56.
- offer and acceptance, 20.
- part performance of, 50.
- performance of, by vendee, 246.
- specific performance of, by heirs of vendee, 249.
- when binding under statute of frauds, 20.
- when enforceable, 12, 56, 246.
- when within statute of frauds, 56.

ORAL AGREEMENT OF WAIVER, 322.

OWNERSHIP, 58.

- outstanding tax titles, see "Tax Titles."

PAROL AGREEMENT:

- see "Oral Agreement to Sell Real Estate."

PAROL EVIDENCE:

- affecting lease, 23.
- when admissible, 23.
- when not admissible, 23.
- when required, 23, 29.

PARTNERSHIP CONTRACTS, 16.

PAVING:

- who shall pay for, 3.

PENALTIES:

- stipulation for, attorney's fees, 316.
- stipulation for, in mortgages, 316.
- stipulation for, in promissory notes, 316.

PERSONAL PROPERTY:

- interest of vendor, under land contract held to be, 354.

PERSONAL SERVICE:

- consideration supporting land contract, 239 N. 240.

PETITION:

- for forms, see "Index to Forms."

PLEA:

- in summary proceedings, 331.

PLEADING AND PRACTICE:

- this subject is treated under the following heads:

- "Damages," "Equity," "Quieting Title," "Discharging Mortgages,"
- "Reformation of Instruments," "Foreclosure of Land Contracts,"
- "Summary Proceeding," "Appeal," "Specific Performance,"
- "Forfeiture."

[References are to Pages]

POLICIES, INSURANCE, 9, 58.

POSSESSION:

- actual possession, notice of interest, 114, 258.
- action to quiet title governed by, 165.
- adverse, 130, 133, 134, 136.
- by ejectment, 324.
- by force, 324.
- by vendee, constitutes notice, 114, 258.
- date of, contained in preliminary agreement, 2, 232.
- may be tenant or holder, 258.
- peaceable, 324.
- statute governing adverse occupants, 143.
- successive adverse occupants, 143.
- when given vendee, 25.
- when repossession accompanied by, declaration of forfeiture, 319.
- wrongful, 170.

POWER OF ATTORNEY:

- to lease or sell land, 96.

PRELIMINARY AGREEMENT:

- see "Agreements Preliminary," "Forms, Index to."

PRINCIPAL AND AGENT:

- contract between, not within the statute, 17.
- division of proceeds between, 17.
- when contract between, unenforceable, 27.

PRIVITY:

- as between successive holders, 143.
- as between vendor and vendee, 143.

PROCESS:

- incompetent persons, relative to, 171.
- minors, relative to, 171.
- order made by Circuit Judge for issuance of, 171.
- publication, 170, 171.

PROMISSORY NOTES:

- attorney's fees stipulated in, 316, 356.
- penalties stipulated in, 316.
- part payment of purchase price, 18 N.

PROPERTY RESTRICTIONS, 7.

PROTECTION OF VENDOR RELATING TO ASSIGNMENT, 8.

PUBLIC POLICY:

- defined, 356.
- forfeiture of land contract for violation of non-assignment clause, 346.

[References are to Pages]

PUBLIC HIGHWAY:

recovery of possession by municipality, 143.
statute of limitations governing, 143.

PUBLIC AUCTION, 15.

QUIETING DEFECTIVE TITLE:

for Forms, see "Index to Forms."
auditor general, when party to suit for, 170.
between owner and purchaser for taxes, 174.
bill of complaint for, see "Forms."
by decree in forfeiture, 340.
decree, see "Forms."
decree for defendant on cross bill, 172.
demand by former owner not grounds for suit for, 170.
effect of decree, 181.
erroneous conveyances involving heir not in possession, 176.
erroneous conveyances involving estate by entireties, 175.
form of bill of complaint, see "Forms."
forms, see "Forms."
fraud, distress, mental incapacity, etc., 175.
hostile interests must be averred in bill of complaint, 175.
jury trial when defendants entitled to in action, 175.
land contract forfeiture, 182.
legatees and devisees, 168.
location of disputed boundary lines not included in action, 174.
marital status of grantors, failure to state, 177.
misdescription of premises, 177.
Michigan decisions concerning action, 172.
outstanding tax titles, 169.
parties to proceedings, 170.
plaintiff, who may bring action, 165, 172.
pleadings and briefs in late Michigan cases, 189.
petition to set aside decree following, 175.
possession, effect of, 175.
principles in relation to, 165.
quit-claim deed by vendee who has forfeited land contract, 172.
statutory provisions covering, 168.
substituted service, 175.
taxes and interest must be paid by plaintiff, 169.
unknown defendants, 170, 172.
unknown heirs, 177.
unknown heirs not to be joined in suit for, 172.
unknown parties not defendants, 172.
when bill for quieting title demurrable, 175.
who may bring action for, 164, 172.

[References are to Pages]

REAL ESTATE:

nature of vendee's interest in land contract, 99.

when contracts covering are valid, see "Statute of Fraud" and "Agreements Preliminary."

RESCISSION OF LAND CONTRACT, 497, 498, 499.

see "Fraudulent Misrepresentation," "Equity," "Equity of Redemption."

REGISTRATION OF AFFIDAVITS:

duties of register of deeds relating to, 130 N.

statutory provisions covering, 130 N.

REGISTRATION OF LAND CONTRACTS:

duties of register of deeds relative to, 105.

effect of, 106.

must be acknowledged for, 105.

specific tax must be paid before, 114.

statutory requirements for, 115.

when execution is defective, curative statutes, 110.

when land affected is in two or more countries, 113.

REGISTER IN CHANCERY:

title abolished, 166.

RELEASE:

of interest in real estate must be in writing, 17, 18, 19, 20.

of interest in real estate by operation of law, 17, 18, 19, 20.

REFORMATION OF LAND CONTRACTS:

bill of complaint, see "Forms."

boundary line stated in contract is incorrect, 451.

consideration is erroneously entered in contract, 451.

contract includes wrong subject matter, 451.

contract omits part of subject matter, 451.

court may enter decree for damages in lieu of decree for reformation, 451.

decree, see "Forms."

description of property is incorrect.

equity will grant relief when, 449.

evidence, 452.

illiterate vendee signs contracts containing wrong price, 451.

lands covered by contract have been platted, 451.

lien on unpaid purchase price due vendee from assignee, 450.

mistake in contract is mutual, 450.

mistakes of law, 451.

mistake of law and facts exist, 402.

mistake of law is concurrent with incompetence, 452.

mistake of law is concurrent with fraud, 432.

[References are to Pages]

names of parties are wrong, 451.
parol evidence admissible to prove mistakes, 450.
part of land has been omitted in contract, 451.
pleadings and briefs of counsel, Michigan cases:
 Clarke v. Johnson (214 Mich. 478), 455.
 LaBranche v. Perron (209 Mich. 239), 470.
rate of interest is erroneously entered, 451.
real contract is not expressed, 451.
timber reservations have been erroneously omitted, 451.
words have been erroneously omitted, 451.

RELIEF FROM FORFEITURE:

see "Forfeiture," "Equity of Redemption."

RESTRICTIONS, 7.

SALE OF LANDS:

see "Agreements Preliminary," "Land Contracts."
auction, 15.
sale of expectant interest in land, 116.
sale and purchase, stages in, 1.
when contract for, must be in writing, 12.

SERVICES:

attorney's, 246.
who defrays expense, 3.

SEWER:

who shall pay for, 3.

SIDEWALK:

who shall pay for, 3.

SPECIFIC PERFORMANCE OF LAND CONTRACT:

for Forms relating to, see "Forms, Index to."
action brought by wife, 259.
administrator or executor of vendor's estate as parties to action, 254
against assignees in bankruptcy, 259.
agreement, preliminary, court may decree, of, 232.
agreement, pre-dated, executed on Sunday not enforceable, 233.
appeal from decree in probate court, 274.
applications of remedy, 230, 232.
assignee or trustee of vendee in bankruptcy not subject to, at instance of vendor or assigns, 259.
assignee or trustee of vendor in bankruptcy, subject to, at instance of vendee and assigns, 259.
assignees as parties to action, 258.
assignee of vendor with notice of prior contract, party defendant, 257.
assignee not a purchaser for value, 257.

[References are to Pages]

- attachment or execution creditor parties to action, 254.
- based on agreement to execute land contract, 232.
- based on oral agreement fully performed, 247.
- based on oral agreement partly performed, 248.
- bills of complaint, see "Forms, Index to."
- breach, effect of first substantial, as to, 244.
- by guardians of incompetents and spendthrifts, 275.
- by guardians of minors, 275.
- by husband against wife, 249.
- by vendor against vendee, 235.
- cases where relief denied, 250, 262.
- cases where relief granted, 245, 260.
- cestui que trust and trustee parties to, 252, 255.
- consideration, inadequacy of, not grounds for denial of, 236.
- consideration in option contract to support, 239.
- consideration, service and improvement, 248.
- continuous service involving support as consideration, 248.
- contract, unfair, harsh, oppressive or inequitable, no relief, by, 237.
- contract, certain in its terms, court will decree, 227.
- contracts executed on Sunday, 233, 311.
- conversation between attorney and defendant's agent concerning, not admissible, 250 N., 259.
- corresponding rights of vendee or vendor, 235.
- damages for part and specific performance as to remainder, 234, 261.
- damages in lieu of, 231.
- decree for, see "Forms, Index to."
- decree may grant vendor lien, 232.
- defective abstract, 232.
- defects in abstracts may be waived by vendee, 248.
- defective title defense to, 252.
- denied when defendant cannot obtain title, 241.
- denied when defendant is old and inexperienced, 238.
- denied when defendant never owned the land, 241.
- denied when defendant unable to comply, 241, 242.
- denied when innocent third party holds title, 242.
- denied when mistake induced by plaintiff, 242.
- denied when mistake known to plaintiff but not induced by him, 243.
- denied when mutuality is lacking, 244.
- denied when parties incompetent, 241.
- denied when performance nugatory or decree impossible, 240.
- denied when terms of contract produce inequalities in equities of parties, 238.
- denied when transfer is based upon:
 - exchange for personal service and action brought by vendor, 240.

[References are to Pages]

- denied where contracts require continuous service involving skill, technical knowledge, 240.
- description of property, undivided interest sufficient, 246 N.
- description of property in Bill of Complaint, 259.
- discretionary, the remedy is, 226.
- dower interest when not affected by, 234.
- effect of conveyance in probate court, 274.
- effect of conveyance prior to hearing, 231.
- effect of registration of decree in probate proceedings, 275.
- effect of first substantial breach of contract, 244.
- enforcement of oral contract, 248, 310.
- evidence in dispute as to amount due, 245.
- evidence, practice, miscellaneous decisions, 259.
- final judgment in summary proceedings defeat action for special performance, 338.
- form of petition, see "Forms, Index to."
- forms, see "Forms, Index to."
- fractional interests owned by defendant, 231.
- fraud or mistake as defenses, 235.
- general principles governing, 227.
- granted in exchanges of lands, deeds in escrow, 249.
- granted when executory contract complies with, 232.
- granted when personal service as consideration has been performed, 247.
- granted when third party has knowledge of outstanding contract, 242.
- granted as to undivided interest, 246 N.
- granted when vendee is not innocent third party, 242.
- grantee of vendor as defendant, 257.
- grantee of vendor cannot sustain against vendee's assignee, 258.
- grantee of vendee v. grantee of vendor, 258.
- guardians of minors, by, 275.
- guardians of incompetent persons, by, 275.
- hearing of petition in probate court, 274.
- heirs at law of vendor parties to action, 254.
- illustrative cases, relief denied, 250, 262.
- illustrative cases, relief granted, 245, 260.
- inadequacy of consideration, 236.
- in cases of substituted service, may be granted, 256.
- increase in value of property no defense, 246.
- inequality of equity, 237.
- innocent holder of title without notice of prior contract can retain it, 257.
- instance of vendor or assigns, 235, 258.
- interest of party in subject matter test, 253.
- interested persons silent, 255.
- intoxication as basis for denial of, 234.

[References are to Pages]

- intoxication as grounds for refusal, 234.
- lashes, may defeat action of, 232.
- lienors and creditors of vendor estate, parties to, 254.
- may be awarded on undivided interest, 246 N.
- minors, guardians of, against, 275.
- mistake as affecting, 242.
- mistake induced by defendant's negligence no defense, 243.
- mistake by defendant without negligence is defense, 243.
- mistake of law, affecting, 310.
- must be based upon competent testimony, 226.
- must be based upon rules of equity, 226.
- mutuality of the remedy, exceptions, 244.
- mutuality of contract necessary for, 244.
- nature of transactions, in action for, may be inquired into, 294.
- non-enforceable agreement, 238, 240.
- one dollar consideration, 248.
- option contracts, 239, 582.
 - see also "Options."
- oral contract, by heirs-at-law, 249.
- oral contract, 249.
- oral contract involving homestead, 249.
- original vendor cannot sustain against assignee of vendee, 258.
- outstanding contracts without knowledge of wife, 256.
- parol agreement based on consideration of service rendered, 247.
- parties to original contract parties to action, 253.
- parties to the action, 253.
- persons having interest in subject matter must be joined in, 253.
- persons having interest may be defendants, 253.
- persons having unknown interest in, 253.
- persons claiming interest in subject matter, 255.
- petition in probate court for conveyance from administrator or executor, 273.
- pleadings and briefs used in late Michigan cases, 282.
- possession of vendee under land contract, defeats, by purchaser from vendor, 231.
- preliminary agreement, 232.
- pre-dated agreement executed on Sunday, 233.
- probate court jurisdiction in, 273.
- property lying outside the state, jurisdiction for, 230, 231.
- provisions for appeal, 274.
- reformation of instruments and specific performance, 231.
 - see also "Reformation of Instruments."
- refusal to become party plaintiff in suit, 255.
- relief denied if contract unfair, harsh, etc., 235, 237.
- relief denied (illustrative cases), 250, 262.
- relief granted, (illustrative cases), 245, 260.

[References are to Pages]

- relief when wife fails to join in contract, 234.
- remedy against husband only, 234.
- remedy discretionary, 226.
- remedy for enforcement of contracts for sale of real estate, 227.
- rule relating to privity of contract, 258.
- sharp practice grounds for denial of, 237.
- specific performance in probate court, 273.
- specific performance of option contract, 239.
- specific performance vendor v. vendee, 235.
- status of unfilled contracts in case of death of one of parties, 272.
- subject matter conveyed to third party, 254.
- Sunday, agreement dated on, cannot be specifically enforced, 233, 311
- substituted service, may be granted in, 256.
- tender, sufficiency of, 246.
- tender, what constitutes, 246.
- the petition in probate court for, 273.
- unfair contract, no relief, by, 237.
- undivided interest, as applied to, 246.
- vendee against grantee of vendor, 257.
- vendee v. vendor, 230.
- vendee v. assignee of vendee, 258.
- vendor v. vendee, 235.
- vendor's lien on land, 232.
- when assignee is entitled to deed, 231.
- when contract is unfair, 237.
- when court may decree damages in lieu of specific performance, 231.
- when court may decree specific performance as to part and damages as to remainder, 234.
- when decree impossible to enforce, 240.
- when deeds in escrow, 230.
- when defendant is non-resident of state, 256.
- when defendant is beyond jurisdiction of courts, 256.
- when equitable jurisdiction firmly establishes, 227.
- when facts do not warrant rescission, 235.
- when granted against original vendor and his vendee, 242.
- when husband makes contract without knowledge of wife, 256.
- when laches may defeat, 232.
- when laches will not defeat remedy, 232.
- when lands lying outside the state, 231.
- when lands lying in other countries, 231.
- when legal remedy inadequate, 227.
- when mistake relates to vital portions of contract, 242.
- when mutual exchange of lands, 230.
- when may be invoked by vendor or vendee, 230.
- when performance would be nugatory, 240.

[References are to Pages]

- when premises have been conveyed to a bona fide purchaser before hearing, 231.
- when relief denied, 250, 262.
- when relief granted, 245, 260.
- when remedy denied in option contract, 582.
- when specific performance of option contract denied, 239, 582.
- when specific performance by publication, 256.
- when two or more remedies may be involved in same action, 231.
- when vendee against purchaser from vendor, 257.
- when vendee refuses contract, 252.
- when wife not proper party, 255, 256.
- where plaintiff has not fully performed, 250.
- where non-enforceable agreement has been performed by plaintiff, 238.
- wife of neither vendor nor vendee need be joined as defendant, 255, 256.
- wife fails to join in contract, relief by, 234.
- wife of vendee or vendor not proper parties when they have not signed contract, 255.

SPECIFIC TAX ON LAND CONTRACTS:

- basis for computation of, 116.
- fixed by statute, 114.

STANDING TIMBER:

- contract for sale of, must be in writing, 16.
- surrender of vested interest in real estate must be in writing, 17.

STATEMENT:

- vendees' right to, 10.

STATUTE OF FRAUDS:

- acceptance under, 20.
- action at law on verbal contract partly performed, 50, 53.
- agreements creating trust come under, 439.
- agreement under, sufficiency of, 14, 20, 21, 50, 51.
- agreements under held insufficient, 50 N., 51, 52.
- agreement pertaining to real estate held not within, 17.
- agreements, partly performed held sufficient, 50 N, 51, 52.
- agreement sufficient to comply with, but practically unenforceable, 25.
- agreements, effect of void, under, 48, 50, 439.
- amendment to, 15 N.
- auction sales, sufficiency of memorandum, 15.
- bargain between agent and principal not affected by, 17.
- briefs used in late Michigan cases, 61.
- commission agreement for sale of real estate, when not void, 565.
- construing instruments together, 14, 20, 438.
- construction of, 13.

[References are to Pages]

- contract, preliminary provision of, 24.
- contracts affected by, 16, 17, 18.
- contracts consisting of detached memoranda, 16, 17, 438.
- contracts, varying terms of by parol evidence, 18 N, 23, 24, 438.
- contracts held insufficient under, 38, 48, 50, 58.
- contracts held sufficient under, 31, 38, 50, 58.
- description by house number sufficient under, 27.
- description held insufficient under, 28 N, 38, 48.
- description held sufficient under, 27, 31, 38.
- does not apply to division of proceeds from sale of lands, 17.
- easements in land, affected by, 16.
- effect of partnership land contracts, 16.
- effect of part performance of oral agreement, 50 to 58.
- effect of verbal right-of-way agreement, 16.
- effect of agreement to extend spur track, 16.
- effect of sale of standing timber, 16.
- effect of void agreements under, 48, 439.
- escrow, when disposal of land contract advisable, 57.
- essentials of contract, 12, 15, 24, 27.
- examples of surrender on release of interests, by operation of the law, 17, 18, 19.
- examples of void verbal agreements, 13 N.
- fire, loss by, pending purchase, 58.
- general consideration of, 12.
- instances where contract has been surrendered by parol, 19 N.
- leases, as affecting, 13.
- letters or telegrams constituting agreement under, 14, 20.
- option comes within, 63, 572.
- oral contracts of partnership dealing in land affected by, 16.
- oral agreements partly performed, when enforced, 55 N.
- part performance of oral agreement, effect of, 50.
- part performance of verbal contracts, 55 N.
- parol evidence, aiding memorandum, by, 23, 62, 438.
- parol evidence, purposes for which may be introduced, 23, 62, 438.
- preliminary contract, essential provisions of, 24.
- provisions of, relating to agreements, 16.
- real estate option, sufficiency of, 573.
- relief refused, uncertainty of contract, 51 N.
- relief granted, 50, 245, 262.
- right-of-way, affected by, 16.
- sufficiency of tender of performance, 60.
- surrender or release of interests in lands, manner of, 17, 18, 19 N.
- surrender or release of interests by operation of law, 18, 19 N.
- tender of performance, sufficiency of, 60.
- timber, sale of standing, affected by, 16.
- two statutes of frauds, 18 N.

[References are to Pages]

STATUTE OF LIMITATIONS:

special statute of, 133.

SUFFICIENCY OF TENDER OF PERFORMANCE:

see "Tender of Performance."

SUMMARY PROCEEDINGS:

advantages of, to vendee, to vendor, 324.

appeal bond, see "Forms."

appeal from judgment, 331, 333.

bond on appeal in, see "Forms."

certiorari to circuit court, 336.

complaint in, 330.

discretion of circuit court on appeal, 336.

duty of commissioner to file return, 337.

effect of final judgment in, 338.

extension of time for appeal, 333.

first step in effecting appeal, 333.

forms, see "Forms."

how service may be made, 330.

incidents in relation to, 331.

jurisdiction of justice of peace, 330.

jurisdiction of circuit court commissioner, 314.

jurisdiction of circuit court on appeal, 338.

limit of time in which defendant may pay, 333

occupancy must be unlawful, 330.

plea in, 331.

pleadings in, see "Forms, Index to."

registration of writ of restitution effect of, 339.

requirements of bond on appeal, 335.

return on appeal in, 337.

return day in, 330, 332.

review of judgment of circuit court, 336.

second step in, effect appeal, 333.

service of summons in, 330.

service by personal delivery, 330.

service by leaving process at abode, 330.

steps in, effect appeal, 333.

substituted service, 332.

taxable costs and circuit court fees, 333.

time in which defendant may pay judgment rendered in circuit court, 338.

vendee's right under, 324.

when appeal must be perfected, 333.

when defendant shall appear, 331.

when laches will not defeat remedy, 232.

who may appeal from judgment in, 333.

[References are to Pages]

who may serve process, 330.
when question of title may be raised, 331.
writ of error, 336.
writ of restitution, when effective, 334.
when remedy may be denied; laches part of plaintiff, 232.
when service must be made, 330.
when terms of contract are ambiguous, 232.

SUMMONS:

prayer for, not necessary in bill of complaint, 168.

SUNDAY:

agreements executed on, 233, 260.
modification of agreement made on, 260.
preliminary agreements executed on, 233.
pre-dated agreements executed on, void, 233.

SUBROGATION:

substitute for clause prohibiting assignment clause, 8.
vendee's right to, 9.

SUB-CONTRACTS:

clauses to be inserted for protection of vendee, 9, 10.

TACKING SUCCESSIVE POSSESSIONS:

as between vendee and grantee, 143.
by administrator, 145.
by landlord, 145.
by mortgagor, 145.
purchaser at judicial sale, 144.
successive grantees, 146.
successive holders, 146.
vendee, 144.

TAXES:

irregularities in sale because unpaid, 169.
lien, when constituting, is cloud on title, 123.
misrepresentations concerning, 494.
owner must pay purchaser of, 176.
property sold under tax title, 169.
specific tax on land contracts, 114.
who shall pay, 3, 8, 9, 25.

TAX TITLE:

invalidity of tax proceedings, 169.
irregularities in tax sale, 169.
outstanding tax titles, 170.
payments made under void tax title not recoverable, 170.
purchaser defendant in suit to quiet title, 174.

[References are to Pages]

purchaser of, must give statutory notice to redeem, 174.
quieting title encumbered by, 169.

TELEGRAMS:

when binding contract formed by, 14, 20.

TENANTS BY THE ENTIRETY:

children of, have no interest, 101.
vendees, when husband and wife, as, 101.

TENDER OF PERFORMANCE:

after notice of forfeiture, 176.
by prospective purchaser from vendee, 60.
necessity of, in relief from forfeiture, 368.
sufficiency of, 60, 346.
time held not to be essence of contract, when, 60.
time essence of contract, when, 60.
when vendor fails to appear, 60.
not necessary for vendee to prepare and tender deed, 246.

TENDER:

see "Tender of Performance."
as requirement for restoration of status quo, 508.
exceptions to general rule governing in rescission of contracts, 508.
general rule governing rescission of contracts, 508.
not condition precedent to bill for restoration, etc., 508.
of deed upon demanding restoration, 508.

TIMBER:

standing sale of, 16.

TITLE:

see "Abstracts of Title," "Quieting Title."
abstracts held defective, 146, 152.
action to quiet, 164.
building restrictions as clouds on title, 247, N. 25.
by adverse possession, how obtained, 130.
clouds on the title, how removed, 164.
clouds on the title, definition of, 122.
correcting, by removing ancient mortgages, 123.
correcting defects, by recording affidavits, 126.
correcting defects, by suit to quiet title, 163.
decisions holding what titles defective, 146, 152.
defective abstracts as defense in specific performance suit, 247.
defects may be waived by vendee, 248.
defects of record, 126, 129.
defects of record, which may be corrected by affidavit, 129.
defects of record, how remedied, 123, 126, 129, 146.
defective titles, Michigan decisions, 146.

[References are to Pages]

distinction between "good title" and "good title as shown by abstract," 120.

distinction between marketable and merchantable title, 120.

doubtful title, what is, 120.

examination of, 3, 25.

fee simple, when vendor does not own, 9.

foreclosure and sale of, under mortgage, 146.

forms, see "Forms, Index to."

furnished by vendor, 68.

how soon furnished, 25, 259.

illustrative cases, clouds on title, 122.

length of time for examination, 25.

marketable, what is, 119, 120.

merchantable, what is, 120.

mortgage, effects on, 123.

property, misdescribed in, 146.

provisions in contract, regarding, 4, 9, 25, 68, 120.

purchaser of tax titles, effect on, 170, 174.

precautions necessary regarding, 9, 68.

quieting title, 164.

remedying defects in, 164.

tax title holder's possession not adverse to holders of, 133.

terms used describing, and effects of, 119.

undetermined suit effecting, 146.

vendee estopped to deny vendor's, 328, 329.

vendor should quiet, 130.

what company shall certify, 3, 25.

when payment of taxes aids adverse possession of, 142.

when in heirs at law, 99.

where contract is silent as to kind of title, 121.

who defrays expense incident to furnishing, 3, 9, 25.

who to furnish, 9.

wife's dower, 147.

VACANT AND UNOCCUPIED PROPERTY:

adverse possession, classes of property, 140.

adverse possession of, what constitutes, 136.

VENDEE:

actions for fraudulent misrepresentation, see "Fraudulent Misrepresentation."

adverse possession claimed by, and rule governing, 136, 143.

adverse possession under contract of purchase by, 143.

agreements preliminary, for forms favorable to vendee, see "Forms, Index of."

assessments payable by, 3, 10.

[References are to Pages]

assignment, right to object where agreement breached by vendor, 244.

assignment to, of leases on property purchased, 10, 11.

assignment by, validity of clause again, 346, 358.

assignment, waiver by vendor of right to object, 322.

broker's commission, when payable by, 570.

capacity, natural and mental, of, 103, 104.

consent necessary, 18, 22.

damages, when entitled to by, 509.

default, under land contract, by, 69.

dower, of widow of, in land contract, 100.

estate by entireties when husband and wife are, 101.

estopped from denying vendor's title, 328, 329.

forfeiture, when laches of, not great, 347.

forfeiture, when results in great loss to, 344.

husband and wife, interest of, as, 101.

husband and wife joined with others as, 102.

illiterate, effect of signing contract containing wrong price, 451.

interest when reduced to amount of mortgage, 10.

mortgage, lien created by, superior to interest of, 7.

mortgage, when assumed by, 10.

obligations after purchase, 112.

possession by, constitutes notice, 114, 258.

possession, when given to, 25.

precautions necessary in accepting title, 9.

privity between vendor and, 143.

protection under sub-contract, 9.

purchasing outstanding title is trustee for vendor, 329 N.

rights, 9, 56, 58, 98.

right to subrogate, 9.

statement from vendor, 9.

specific performance, see "Specific Performance."

tender of performance, when vendor fails to appear, 66, 246.

tacking successive possessions, as between grantee and, 144.

vendor's title, estopped to deny, 328.

vendor's title, when, not estopped to deny, 328.

vendor's title, when, acquires, 329.

title in equity held to be in, 98.

VENDOR:

administrator, vendor's interest passes to, 99.

adverse possession, 143.

adverse possession, vendee v. vendor, 136.

agreements preliminary, for forms favorable to vendor, see "Forms, Index of."

assignment and enforcement of lien, 117.

assignment, right to object, where agreement breached by, 244.

[References are to Pages]

assignment, short form with consent of, 91.
assignment, validity of clause against, 346, 356.
assignment, waiver of right to object by acts of, 322, 354.
breach of contract by, 347.
capacity, natural and mental, 103, 104.
damages, liability of, 509.
default by vendee, course open to, after, 312, 343.
dower, of widow of, in land contract, 99.
ejectment, to obtain possession by, advantages of to, 324.
equitable lien for unpaid purchase price, 117.
foreclosure of lien, see "Foreclosure of Vendor's Lien."
forfeiture, waiver of, by, 347.
forfeiture, when payments accepted by, waives right to, 322.
forfeiture, when results in great loss to, 344.
fraudulent misrepresentations by, see "Fraudulent Misrepresentations."
how affected by bona fide purchaser, 117.
identity of, 129.
interest of, analogous to interest of mortgagee, 354.
interest passes to administrator, 99.
interest under land contract, of, 9.
liable to broker, in refusing to consummate sale, 565.
lien for unpaid purchase price, 117, 312.
marital status of, 126, 129.
name of, 126.
nature of estate, created by land contract, title in, 98.
not confined to sale of legal title or title in fee, 117.
personal property, interest of, 354.
privity, as between vendee and, 143.
protection in assignment clause, 8, 26.
quieting title by, 130.
repossession by, 319.
rights and obligations, 7, 8, 9, 98, 117.
specific performance, see "Specific Performance."
summary proceedings by, see "Summary Proceedings."
title, in land contract held by, 403.
title need not be marketable at time of sale, 146.
title, when vendee not estopped from denying, 329.
when fee simple title not owned by, 9, 26, 99.
when husband and wife are, 102.
wife of, should execute land contract to bar dower, 99.
witness to signature of, 104.

VENDOR'S LIEN:

foreclosure of, 319.

[References are to Pages]

VERBAL AGREEMENT:

see "Oral Agreement to Sell Real Estate."

VOID AGREEMENT:

promise made in consideration of, 48.
ratification of by part performance, 50, 56.
when money has been advanced, 48.
when one agrees to purchase for third party, 48.
when enforceable by equitable estoppel of defendant, 296, 310.

WAIVER:

of actions by foreclosure of vendor's lien, 406.
of forfeiture on default in contract, 322.
of irregularities in summary proceedings by defendant, 331, 332.
of right to rescind by conduct of plaintiff, 322, 347.
when conduct of parties constitute, 60, 61.

WATER ASSESSMENT:

who shall pay, 3.

WIFE:

compensation for present value of wife's contingent right of dower, 234.
dower interest of, in land contract, 100.
failure of, to join in execution of land contract, 234.
when not party defendant in specific performance suit, 234.

WITNESSES:

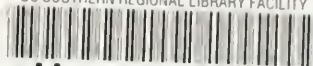
statutory requirements of, as to land contract, 104.
when required number is missing in land contract, effect of, 110.

WRITTEN INSTRUMENTS:

when part of pleading and how used, 167.
see also "Agreements Preliminary," "Land Contracts," "Statutes of Fraud," "Brokers," "Specific Performance," "Fraudulent Misrepresentations."

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